No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1941

MARY W. STEWART ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court for the Northern District of California (R. Vol. I, pp. 165–176) is reported in 29 F. Supp. 59. The opinion of the Circuit Court of Appeals (R. Vol. V, pp. 148–169) is reported in 121 F. (2d) 705.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1941 (R. Vol. V, pp. 169–170). A petition for rehearing was denied October 16, 1941 (R. Vol. V, p. 170). The petition for a writ of certiorari was filed January 8, 1942, and

was granted on February 16, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a Mexican grant of Mare Island, "in all its extent," which was confirmed in 1855 by the Board of Land Commissioners as an island "bounded by the water's edge," included all lands above the line of ordinary high tide.

2. Whether a prior suit to which the United States did not consent and was not a party and in which it was held that petitioners' predecessors in interest were entitled to possession of the lands in suit, established "a rule of property" which forecloses the United States from now asserting its title.

3. Whether the Act of March 3, 1891, bars the cancellation of patents for some of the lands which were issued more than six years ~~prior~~ Prior to the present suit, even though Congress never authorized the Land Department to dispose of the lands.

4. Whether the United States is estopped from suing to quiet title to its lands because the petitioners have improved and long been in possession of the lands under patents issued by the United States, where Congress never authorized issuance of the patents or relinquishment of the rights of the United States and the petitioners at all times had means of knowing of the infirmities in their claim of title.

STATEMENT

This is a companion suit to *United States* v. *O'Donnell, et al.*, 303 U. S. 501, and was brought to quiet the Government's title to an area of tule marsh lands lying contiguously northwest of the "O'Donnell" lands on Mare Island in San Pablo Bay, California.

In the *O'Donnell* case, this Court held that the validity of the Castro grant—under which the United States asserts ownership to the whole Island[1]—is no longer open to question, and upheld the title of the United States to the marsh lands there involved. 303 U. S. at 508, 514. In the present case, petitioners, like the defendants in the *O'Donnell* case, claim title under patents from California, the supposed title of California having been obtained from the United States under the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519. While they do not now challenge the validity of the Castro grant, petitioners renew the

[1] Although the Government's ownership of the lands in both cases is claimed under a common title, separate suits were filed because the adverse claimants in each case claimed under separate swamp land surveys by the State of California and also because the "affirmative defenses" asserted by petitioners (R. Vol. I, pp. 37, 70–82, 83–93, 94–95, 131–153) were not advanced by the claimants in the *O'Donnell* case. Petitioners' statement (Br. 14) that "the issues decided in the *O'Donnell* case are entirely different from those presented here," therefore, can have reference only to their affirmative defenses, which are based on the so-called "rule of property," the statute of limitations and equitable estoppel.

contention made and overruled in the *O'Donnell* case [2] that none of the marsh lands, which comprise the greater part of the Island, were included within the grant, because none were within the area commonly known by the name "Mare Island" in 1841 when the grant was made or in 1855 when it was confirmed by the Board of Land Commissioners. The marsh lands lie to the northwest of the high lands where the main plant of the Mare Island Naval Yard is located.

Petitioners also contend that even though the lands were within the confirmed grant, the United States is barred from asserting its title (1) by reason of a "rule of property" said to arise from a prior suit to which the United States was not a party; (2) because the statute of limitations barred the cancellation of patents covering some of the lands involved; and (3) under general principles of equity and the doctrine of equitable estoppel.

The facts essential to an understanding of the case may be summarized as follows:

The Mare Island area.—For the convenience of the Court, a sketch of Mare Island has been inserted as a frontispiece to this brief. The Island is close to the mainland of California and extends in a southerly direction into the Bay of San Pablo. At its southern extremity there is an area of high and

[2] See Brief for Respondent, pp. 22–23, 31–45, and Reply Brief for United States, pp. 18–40, No. 487, October Term, 1937.

dry land of approximately 900 acres, upon which the main plant of the Navy Yard is located. Immediately north of these high lands is a narrow neck or isthmus of reclaimed swamp lands, which were the lands involved in the *O'Donnell* case, and which are known in the record as Survey No. 34. This neck or isthmus joins the high lands on the south to a larger area of reclaimed swamp lands on the north. This latter area, which extends and spreads out fanwise toward the mainland and which is the land in this suit, is known as Survey No. 569. See *Sawyer* v. *Osterhaus,* 212 Fed. 765 (N. D. Cal.).

The Government claims ownership of the entire area bounded on the east by Dutchman Slough, Napa River and Mare Island Straits, on the south by Carquinez Straits, on the west by San Pablo Bay, and on the north by Navy Yard Slough. Petitioners contend that the northern boundary of the Island is, and has always been known to be, at the northern end of the high lands, shown on the sketch as a red line.

Acquisition of title by the United States.—In May, 1841, Alvarado, Mexican Governor of California, granted to Victor Castro the island of "La Yegua" (Mare Island) "in all its extent" (R. Vol. I, pp. 21, 165, 260). By mesne conveyances, Bissell and Aspinwall and another acquired the Castro grant and presented it for confirmation to the Board of Land Commissioners established by the Act of March 3, 1851, c. 41, 9 Stat. 631. The Board

confirmed the grant in a decree dated May 8, 1855, which provides (R. Vol. V, p. 70):

> The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called "Isla de la Yegua" or Mare Island and being an Island is bounded by the water's edge.

While these proceedings were pending, a board of naval officers, under Senior Officer J. D. Sloat, recommended that Mare Island be selected as a site for a navy yard and naval depot and commenced negotiations with Bissell and Aspinwall for the purchase of the Island (R. Vol. III, pp. 13–57, 38, 43–50; Vol. II, p. 395). The report of the board described the Island as "bounded on the east by Mare Island straits * * * on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma" (R. Vol. III, p. 26), and the owners stated that it contained about 900 acres of high or dry land and about 1,300 acres of tule or low ground (R. Vol. III, p. 44). On December 10, 1852, the Secretary of the Navy offered to purchase "Mare Island as recently surveyed and reported by" the Board. In his letter of offer he stated that he understood that the proposed deed would cover

> that tract of land known as Mare Island in California including all the tide or low land and marsh belonging to the same, or which

> has ever been reputed or claimed to belong to the same * * *. (R. Vol. III, p. 51.)

The offer was accepted, and on January 4, 1853, Bissell and Aspinwall executed their deed of Mare Island for a consideration of $83,491.00 (R. Vol. III, p. 70). On February 28, 1853, they gave a bond indemnifying the United States against any failure of their title (R. Vol. III, p. 76). The deed described Mare Island in substantially the same terms as those contained in the Secretary's offer of purchase.[3] On February 11, 1853, President Fillmore, by executive order, reserved the Island for public uses "together with all its appendages of Tule or Marsh land ordinarily reputed to belong to said island * * *" (R. Vol. III, p. 59).

Petitioners' claim under the Swamp Act.—By the Swamp Lands Act of September 28, 1850, c. 84, 9 Stat. 519, the United States granted to California the swamp and overflowed lands within her borders which were not privately owned. In 1856 the "O'Donnell" lands in the narrow neck or isthmus

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[3] The description in the deed reads as follows: "* * * all that tract of land and Island called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for the Navy Yard there, including all the Tule or low land and Marsh belonging to the same or which has ever been reputed or claimed to belong to the same, and all waters, harbors, bays, creeks, and other waters, privileges, benefits, advantages, tenements, hereditaments and appurtenances thereunto belonging (excepting only as hereinafter expressed) * * *."

were surveyed by the deputy county surveyor as "Survey No. 34 of Swamp and Overflowed Lands." Thereafter, on June 25, 1869, at the request of one Jacob C. Hinckley, a survey was made of the lands in suit by the county surveyor of Solano County, which became known as Swamp and Overflowed Survey No. 569 (R. Vol. IV, p. 37). Five years later, on April 7, 1874, California issued its patent for the land so surveyed to one John W. Pearson, assignee of Hinckley (R. Vol. III, pp. 185–187).

In 1883 Pearson's successors, under whom petitioners claim, brought an action in ejectment against the Commandant of the Navy Yard to obtain possession of the Survey No. 569 lands. The Commandant, who was represented by the United States Attorney and a Special Assistant appointed at his request by the Attorney General (R. Vol. III, p. 203), defended on the ground that the state patents conveyed no title because the Secretary of the Interior had not segregated and identified the lands as swamp and overflowed lands, and on the further ground, *inter alia*, that title was in the United States under the Castro grant. Mr. Justice Field, sitting on circuit, and Judge Sawyer held, however, that since the Swamp Lands Act was a grant *in praesenti*, the absence of a segregation could not defeat the plaintiffs' claim and that they were entitled to show the character of the land by parol evidence. That evidence showed, the court said, that the lands were subject to

"periodical overflow by the rising of the tides" and that large portions were "also separated from the island by navigable sloughs" (28 Fed. at 712, 713). The court concluded that the lands were below the line of ordinary high tide, and, therefore, not included within the Castro grant or confirmation decree.[4] Judgment was accordingly entered against the Commandant. *San Francisco Sav. Union* v. *Irwin,* 28 Fed. 708 (C. C. Cal.). This Court affirmed the judgment. 136 U. S. 578 (1890).[5]

By the affirmance of this judgment, officers of the Navy Department felt that the title of the United States "was lost" (R. Vol. III, pp. 262, 264). Dr. L. E. Cross, one of petitioners' predecessors in interest, went into possession of the lands six years later and asked the Commandant for permission to employ a Navy Yard surveyor to locate the southern boundary of his claim. The Commandant agreed with the hope "that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein" (R. Vol. II, pp. 690–692). That same year, 1896, and in 1910 and 1924, patents were issued by the United States to California covering, in the aggregate, all of the lands in suit

[4] Petitioners now admit, as they did in the court below, that the lands were above ordinary high tide (Br. 28).

[5] A detailed discussion of the *Irwin* case is set forth in the Argument, *infra,* pp. 36–41.

(R. Vol. III, pp. 189, 192, 196). On November 10, 1913, a map of the Mare Island Naval Reservation was filed with the Solano County Recorder designating only the high lands and the neck of the island (R. Vol. II, pp. 652–653; Vol. IV, p. 38). Such a map was required by Cal. Stats., 1897, pp. 51–52, ceding exclusive jurisdiction over all United States lands "now held, occupied, or reserved * * * for military purposes or defense."

Meanwhile, permission had been granted by the county to reclaim the lands (R. Vol. III, pp. 225–231), and petitioners' predecessors commenced construction of levees to reclaim them "for general agricultural purposes, stock raising" (R. Vol. II, p. 529). In recent years the northwest portion has been used "mostly for gun clubs," or a "duck club" (R. Vol. II, pp. 631–632, 637). Dr. Cross' son lived on the lands with his family and workmen from 1898 to 1907 (R. Vol. II, pp. 526, 532, 689), and a farmer named Haroid Casebolt testified that he has lived there for seven years, during which time he has been a registered voter of Solano County, voting at Bay Terrace, across the Napa River (R. Vol. II, pp. 635–637). The record does not disclose that anyone else has lived on this land. The Pacific Gas & Electric Company has erected power lines "across the northern section of the gun club" (R. Vol. II, pp. 632–633, 636) under a right-of-way and easement obtained from Dr. Cross in 1911 (R. Vol. I, p. 160). In 1926 to 1928, the Sears Point Toll

Road constructed a toll road of 7.3 miles (R. Vol. II, pp. 677–679) under a franchise from Solano County (R. Vol. II, p. 671; Vol. III, pp. 205–224), after Congress granted a right-of-way across the lands in suit. Act of June 22, 1936, c. 703, 49 Stat. 1819.[6]

Despite the foregoing facts, it is not true, as petitioners assert (Br. 8), that the result of the *Irwin* case "was accepted as final by everyone." The opinion of the Attorney General (R. Vol III, pp. 276–284) and the California act of cession (Cal. Stats. 1854–1855, c. 43, pp. 48–49) referred to by petitioners (Br. 8) antedated the final judgment in the *Irwin* case by more than 35 years and were concerned only with the tidelands abutting the proposed navy yard site.[7] Township plats covering the lands in suit, except the portion which had been formally sectionized long prior to the *Irwin* decision, were not approved until 1923 (R. Vol. IV, pp. 52–54). And final patent to a large portion of the

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[6] This statute was enacted at the request of the Golden Gate Bridge and Highway District, which was acting on the advice of the Attorney General of California (Hearings, H. Committee on Naval Affairs, H. R. 10356, 74th Cong., 2d sess. (1936), pp. 3005, 3007, 3013, 3029). Congressman Welch of California, who sponsored the measure, told the Naval Affairs Committee while this suit was pending (p. 3013) that "The State of California has no quarrel with the Government on the question of title."

[7] For a full discussion of the Attorney General's opinion and the effect of the act of cession, see Reply Brief for Petitioner in *United States* v. *O'Donnell*, No. 487, Oct. Term, 1937, pp. 41–43.

lands was not issued until 1924 (R. Vol. III, pp. 196–201).

The reason for this delay appears clearly from the files of the General Land Office, as disclosed in the record in the *O'Donnell* case. In 1905, the Commissioner of the General Land Office advised the Secretary of the Interior that the whole of Mare Island, including all of the tule marsh lands, was owned by the United States and was under the jurisdiction of the Navy Department so that the Land Department was without authority to survey the section lines (Record in No. 487, Oct. Term, 1937, R. pp. 533–541). Again, in 1912, California "applied for the certification to it of all the swamp and overflowed lands returned as such on U. S. plats of T. 3 N., R. 4 W., and T. 4 N., R. 4 W., M. D. M.," which included a large portion of the lands in suit. After a two-year controversy, the Commissioner rejected the application. His opinion traces the history of the Government's title to all of the tule marsh lands on Mare Island, reviews fully the decision in the *Irwin* case—pointing out also that the rule as to segregation followed in that case was overruled in subsequent decisions of this Court—and refuses "to recognize the claim of the State" because title to the entire marsh area was acquired by the United States under the Castro grant (Record in No. 487, Oct. Term, 1937, pp. 542–551). Because of this ruling, a writ of mandamus was issued from the Supreme Court of the District of Columbia, and in compliance therewith W. J.

Lightfoot, a United States Surveyor, was instructed on January 6, 1915, to make an examination and investigation of the swamp and overflowed lands of Mare Island. In his report of the same year, he concluded that they were a part of the Island (Record in No. 487, Oct. Term, 1937, pp. 181, 596–620).

Again, on January 27, 1921, United States Cadastral Engineer Francis E. Joy was instructed by the General Land Office "to determine the lands properly belonging to Mare Island in 1850." He reported on October 23, 1922, concluding that all the marsh lands bounded by navigable water were parts of the Island and, specifically, that "it [the Island] extended into R. 5 W., bounded on the North by South or Navy Yard Slough." This would include the lands in suit. His plat, as corrected in accordance with further special instructions, was accepted by the General Land Office in November 1923. (Record in No. 487, Oct. Term, 1937, pp. 43, 622–632). Finally, on February 12, 1925, the Secretary of the Navy in protesting to the Secretary of the Interior against the issuance of patents to the lands within Survey No. 34, recited the whole history of the controversy over the swamp and tule marsh lands on Mare Island and unequivocally took the position that the Castro grant "included all of the tule lands which physically formed an integral part thereof." His protest concluded (Record in No. 487, Oct. Term, 1937, p. 561):

> The Navy Department, therefore, maintains that under the foregoing deed of January 4, 1853, it acquired all of Mare Island extending from San Pablo Bay on the south and west to Mare Island Straits and Napa Bay on the east and Sonoma Creek on the north * * *.

These are the same boundaries contended for by the Government in the present case.

Proceedings below.—On April 22, 1930, the Government brought this suit in the United States District Court for the Northern District of California to quiet its title to Mare Island acquired by virtue of its deed from Bissell and Aspinwall. Since the *O'Donnell* case was decided by this Court before the conclusion of the trial in the present case, petitioners withdrew their objections to the validity of the Castro grant, but continued to defend the suit on the ground, overruled in the *O'Donnell* case, that none of the tule marsh lands were included within the grant for the reason that the northern boundary of Mare Island was at the line shown in red on the frontispiece to this brief. The United States contended that the boundaries of the Castro grant were conclusively established by the decree of the Board of Land Commissioners at the "water's edge" or the line of ordinary high tide, and introduced testimony to prove that all of the lands claimed under the decree were above that line.

Toward the end of the trial, petitioners admitted that the lands claimed by the Government were

above the line of ordinary high tide, but denied that the decree of confirmation conclusively established that line as the boundary of the Castro grant. Rather, they contended that under Mexican law the grant could only extend to the line of highest high tide and that the lands in suit were cut off from the high lands of Mare Island by the flow of water across the neck of the island at highest high tide. In other words, they contended that the decision in the *O'Donnell* case to the effect that the neck was part of Mare Island was erroneous. They also took the position that the Castro grant was a grant of a place by name, and that since the record shows that the lands in suit were not known as part of Mare Island prior to the confirmation proceedings, title to them was not confirmed by the Board's decree.

In addition, petitioners advanced three affirmative defenses: (1) as to the lands covered by the patents issued in 1896 and 1910, the suit was barred by the six-year limitation of the Act of March 3, 1891, c. 561, sec. 8, 26 Stat. 1095, 1099; (2) that the southern line of the lands claimed by them had become a public boundary in which the United States had acquiesced and through which California and its successors had obtained a valid title to the lands in suit; and (3) that the United States was estopped from asserting its legal title in this suit in equity.

The trial judge, who also had presided at the trial in the *O'Donnell* case, held for the petitioners

(R. Vol. I, pp. 257–258, 279). Without undertaking to state definitely where he thought Mare Island began or ended, he found that none of the lands in suit ever was a part of Mare Island (R. Vol. I, p. 261). This finding is directly contrary to his finding in the *O'Donnell* case that the lands there involved were a part of Mare Island, since there is no evidence or claim that the lands here involved were separated by water from those involved in that case or were not a part of the place known as "Mare Island" if the *O'Donnell* lands were. His opinion shows that, notwithstanding the fact that petitioners conceded that they could not acquire title by adverse possession as against the United States, he based the decree chiefly upon the ground that even if the lands were included in the Castro grant, petitioners' "open, exclusive, continuous possession * * * preclude the Government from ever establishing its claim to ownership" (R. Vol. I, pp. 175–176).

The trial court also held (R. Vol. I, p. 176), as to the lands for which patents were issued in 1896 and 1910, that the present suit is barred by the Act of March 3, 1891, c. 561, Sec. 8, 26 Stat. 1095, 1099, which requires suit for cancellation of a patent to be brought within six years after issuance of the patent. The court stated (R. Vol. I, p. 169) that it was unnecessary to discuss the merits of the affirmative defenses that a public boundary divides Mare Island from the lands claimed

by petitioners,[5] and that the United States is estopped from asserting its title.

The Circuit Court of Appeals reversed (R. Vol. V, pp. 169–170). The majority held that the confirmatory decree of May 8, 1855, conclusively established the Government's title to all land above mean high-water, and that since it was undisputed that the marsh lands were all above that line (R. Vol. V, pp. 155, 167), title to the entire area was vested in the United States (R. Vol. V, pp. 157–158). The court also held that the Act of March 3, 1891, did not bar cancellation of the patents issued in 1896 and 1910 (R. Vol. V, pp. 161–162), and that under the rule that the United States cannot be prejudiced by unauthorized action of its officials or by laches, the suit was not barred in equity (R. Vol. V, pp. 163–166).[6]

Judge Denman, concurring, stated that he did so "despite the grossly inequitable result arising from the Government's reliance on its freedom from the defense of laches," and expressed the view that this "is peculiarly a case for Congres-

[5] Petitioners have abandoned this defense in this Court. The court below held that it was "too far-fetched to warrant extended comment" (R. Vol. V, p. 163).

[6] The court below held that the land east of Boat Cut-off or Dutchman's Slough (see frontispiece map) was not a part of the Castro grant, since Boat Cut-off was found to be a navigable waterway. It affirmed the judgment of the district court with respect to this land (R. Vol. V, pp. 158–161). The Government has not sought review of this holding.

sional remedial action, beyond the equitable powers of this court" (R. Vol. V, p. 166). Judge Mathews, who dissented, did so upon the ground that the trial court found, in effect, that the lands in suit were not known as a part of Mare Island at the time of the grant to Castro or at the time of the confirmation decree in 1855, and that, therefore, they were not included within the deed to the United States (R. Vol. V, pp. 167–168).

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals correctly held that the boundary of the "water's edge" contained in the decree of confirmation conclusively establishes the legal title of the United States to the lands in suit. The "water's edge" is a specific boundary and under the common law, by which the decree must be construed, it means the line of ordinary high tide. It is admitted, and the record establishes, that all of the tule marsh lands here involved were above that line. Indeed, the record shows an unbroken shore line around the entire area claimed by the Government which in the 1850s rose to an elevation which was even higher than the line of highest tide. Thus, even if the words "water's edge" were to be construed according to the Mexican law to mean the line of highest high tide, the title to the lands in suit would have passed to the United States.

In view of the fact that the confirmation decree specified the boundaries of the Castro grant, its extent may not now be determined by reputation evidence as to what was known as "Mare Island" at the time of the grant or decree. Even if such evidence could be relied upon, the record would not support petitioners' contention that the lands in suit were not included.

II

The judgment in *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed, 136 U. S. 578, is not a bar to the present suit. Since the United States was not a party and did not consent to the action in that case, the judgment is not *res judicata* in this case, as petitioners concede. *Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. 196, 217, 222; *Hussey* v. *United States*, 222 U. S. 88.

The contention that the judgment established a "rule of property" from which the courts are not free to depart cannot be supported. The only principles of law which were laid down in that case which are pertinent to this case were that the confirmation decree should be construed as a common law instrument and that, so read, the boundary of the "water's edge" specified in the decree means the line of ordinary high tide. These conclusions are in accord with and support the Government's position in this case. The holding in the *Irwin* case that the lands in question were not included

among those confirmed and did not pass to the United States was based on a finding that they were below the line of ordinary high tide. Such a finding of fact does not give rise to any "rule of property" in the true sense of the phrase. To give the finding in the *Irwin* case binding effect in this suit would seem particularly extraordinary since the evidence shows and petitioners admit that the lands actually were at all times above the line of ordinary high tide.

III

The Circuit Court of Appeals correctly held that the Act of March 3, 1891, which provides that suits to vacate or annul patents to land must be brought within six years after their issuance, does not bar the cancellation of the patents issued in 1896 and 1910 covering a portion of the lands in dispute.

The 1891 Act is applicable only to suits involving patents to "public lands," that is, "to those open to sale and conveyance through the land department." *United States* v. *Minnesota,* 270 U. S. 181, 196; *United States* v. *Winona &c. Railroad,* 165 U. S. 463, 476; *Northern Pac. Ry. Co.* v. *United States,* 227 U. S. 355, 367. Since the lands in suit were not purchased by the United States until January 4, 1853, they obviously were not open to sale and conveyance through the Land Department under the Swamp Lands Act of September 28, 1850, for that act was a grant *in praesenti. United*

States v. *O'Donnell,* 303 U. S. at 509. No contention has been or can be made that the Land Department was authorized by any other statute to open to sale the lands here involved.

IV

The United States is not barred from the relief it seeks in whole or in part by estoppel or any other recognized principle of equity. While it is true that the United States is, generally speaking, subject, as a suitor, to the general principles of equity, its legal rights may not be determined upon general notions of fairness.

Petitioners rely upon the doctrine of estoppel. But Congress has not relinquished the Government's title and it is settled that the United States may not be estopped by the unauthorized acts or laches of its executive or administrative officers. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389.

Furthermore, as stated by the court below, petitioners' claim of title has been "shrouded in doubt and uncertainty" from the beginning (R. Vol. V, p. 165). They have not shown that they were "without knowledge of the true condition of the title" or that they "had no convenient and available means of acquiring such knowledge." *Standard Oil Co. of California* v. *United States,* 107 F. (2d) 402, 416 (C. C. A. 9), certiorari denied, 309 U. S. 673.

ARGUMENT

I

THE GRANT OF MARE ISLAND TO THE UNITED STATES INCLUDED THE LANDS IN SUIT

The Circuit Court of Appeals correctly held (R. Vol. V, pp. 154–158) that the decree of confirmation conclusively fixed the specific boundaries of the grant at the line of mean high tide, and that, therefore, since all of the lands in question are admittedly above that line, the ancient reputation of the extent of the grant is immaterial.

A. *The confirmatory decree conclusively fixed the boundaries of Mare Island at the line of ordinary high tide*

The grant to Castro was for Mare Island "in all its extent" (R. Vol. I, pp. 21, 165, 260). The confirmatory decree entered by the Board of Land Commissioners on May 8, 1855, confirmed the title of the Government's predecessors to "Mare Island * * * being an island * * * bounded by the water's edge" (Vol. II, p. 384, Vol. III, p. 1, U. S. Ex. D–1). It is the position of the Government that this decree conclusively establishes a valid title in the United States to all of the lands on the Island above the line of ordinary high tide.

1. The phrase "water's edge", as the court below held (R. Vol. V, pp. 154–156), is synonymous with shore and clearly calls for a boundary at the line of mean high tide. As early as 1864 in *United States* v. *Pacheco*, 2 Wall. 587, this Court held that

when "the sea, or a bay, is named as a boundary, the line of ordinary high-water mark is always intended where the common law prevails" (p. 590). And in *San Francisco Sav. Union* v. *Irwin,* 28 Fed. 708, 713 (C. C. Cal.), affirmed 136 U. S. 578, upon which petitioners heavily rely and which involved these same lands, the Circuit Court (per Mr. Justice Field) stated that decrees written in the English language must be interpreted according to the common law, and that by that law "the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark." See also *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 22–23; *People of Porto Rico* v. *Fortuna Estates,* 279 Fed. 500, 506 (C. C. A. 1); *Coburn* v. *San Mateo County,* 75 Fed. 520 (C. C. N. D. Cal.).

This is also the settled rule in California, where it was established by statute as early as 1850 (Woods Digest, 168). *People* v. *Morrill,* 26 Cal. 336, 353–354 (1864); *Wright* v. *Seymour,* 69 Cal. 122, 126–127 (1886); *Heckman* v. *Swett,* 99 Cal. 303, 307 (1883); *Eichelberger* v. *Mills Land, Etc. Co.,* 9 Cal. App. 628, 639–640 (1908); *Forgeus* v. *County of Santa Cruz,* 24 Cal. App. 193, 194–195 (1914). The same rule has at all times been followed by the General Land Office which, by Section 13 of the Act of March 3, 1851, c. 41, 9 Stat. 631, was required to survey all confirmed Mexican

claims.[10] In *Ward* v. *Mulford*, 32 Cal. 365 (1867), where one of the boundaries given in the decree of confirmation was "west by the bay", the court held that the Land Office had correctly surveyed the claim at the line of ordinary high water mark. Similarly, in *Teschemacher* v. *Thompson*, 18 Cal. 11 (1861) the decree confirming the San Mateo Rancho gave as one of the boundaries "the Bay of San Francisco" and the court held that the Land Department properly issued a patent to the line of ordinary high water. See also *More* v. *Massini*, 37 Cal. 432, 433 (1869).

2. That the tule marsh area in both Surveys 34 and 569 was above mean or ordinary high tide at the time of the grant and confirmation proceedings cannot be disputed. To show that the marsh lands have always been above that line the Government introduced a long series of maps, charts, and surveys—all that could be found after a painstaking search—dating from 1775 to the time of trial,[11]

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[10] "All navigable bodies of water and other important rivers and lakes are to be segregated from the public lands at mean high water elevation." Manual of Instructions for the Survey of the Public Lands of the United States (1930), p. 216. See also 1894 edition, p. 56.

[11] U. S. Exhibits. F–2 (R. Vol. II, p. 395, Vol. IV, pp. 1–2); I (R. Vol. II, p. 400); J–1 to J–6 (R. Vol. II, p. 404); K–1 (R. Vol. II, p. 408, Vol. IV, p. 3); K–2 (R. Vol. II, p. 410, Vol. IV, p. 4); K–3 (R. Vol. II, p. 411, Vol. IV, p. 5); K–4 (R. Vol. II, p. 413, Vol. IV, p. 6); K–5 (R. Vol. II, p. 414, Vol. IV, p. 7); K–6 (R. Vol. II, p 417, Vol. IV, p. 8); K–7 (R. Vol. II. p. 418, Vol. IV, p. 9); K–8 (R. Vol. II, p. 613); L–1 (R. Vol. II, p. 428, Vol. IV, p. 10);

as well as expert testimony by hydrographic and geodetic engineers based upon careful studies of tidal observations, physical characteristics, and analysis of previous surveys and reports (R. Vol. II, pp. 395, 400, 557). After this testimony was introduced, petitioners expressly conceded that all of the lands were above the line of mean high tide (R. Vol. V, p. 167), and they renew that concession in this Court (Br. 28). Hence, there is no question that there is and always has been a continuous unbroken mean high tide line all around the island from the Straits of Carquinez on the south to Mare Island Straits and Napa River on the east, through Navy Yard Slough to Sonoma Creek on the north, and San Pablo Bay on

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L–2 (R. Vol. II, p. 430, Vol. IV, p. 11); L–3 and L–4 (R. Vol. II, p. 430); L–5 (R. Vol. II, p. 437, Vol. IV, p. 12); L–6 (R. Vol. II, p. 438, Vol. IV, p. 13); L–7 (R. Vol. II, p. 438); L–8 (R. Vol. II, p. 450, Vol. IV, p. 14); L–9 (R. Vol. II, p. 452, Vol. IV, p. 15); L–10 (R. Vol. II, p. 461, Vol. IV, p. 16); L–11 (R. Vol. II, p. 463, Vol. IV, p. 17); L–12 and L–13 (R. Vol. II, p. 467); L–14 (R. Vol. II, p. 468, Vol. IV, p. 18); L–15 (R. Vol. II, p. 473, Vol. IV, p. 19); L–16 (R. Vol. II p. 474); M–1 (R. Vol. II, p. 476); M–2 (R. Vol. II, p. 478); M–3 (R. Vol. II, p. 479); M–4 (R. Vol. II, p. 480); M–5 (R. Vol. II, p. 481); M–6 (R. Vol. II, p. 482); M–7 (R. Vol. II, p. 559); N (R. Vol. II, p. 484, Vol. IV, p. 20); O (R. Vol. II, p. 548); P–2 to P–4 (R. Vol. II, p. 554); Q (R. Vol. II, p. 557, Vol. III, p. 137); R (R. Vol. II, p. 573, Vol. IV, pp. 21–25); S–1 (R. Vol. II, p. 576, Vol. IV, p. 26); S–2 (R. Vol. II, p. 577, Vol. IV, p. 27); T (R. Vol. II, p. 586, Vol. IV, p. 28); U (R. Vol. II, p. 586); V–1 (R. Vol. II, p. 603, Vol. IV, p. 30); V–2 (R. Vol. II, p. 603, Vol. IV, p. 29); W (R. Vol. II, p. 611, Vol. IV, p. 31).

the west. In short, under every common law concept there has always been only one island, Mare Island, and its northern boundary is Navy Yard Slough to Sonoma Creek.

3. Petitioners contend (Br. 65; Appendix A, pp. i–iii) that under the Mexican law the grant to Castro went, not to the common law line of ordinary high-water mark, but only to the line of the highest high-water. Therefore, they suggest (Br. 65–70), since the confirmation decree should be presumed not to have covered more land than was included within the grant, the words "water's edge" appearing in it should be construed according to the Mexican law. The court below properly held, however, that "It is to be presumed in the absence of internal evidence to the contrary—and the decree contains no such evidence—that the terms used were intended to bear the meaning ordinarily attached to them at common law" (R. Vol. V, p. 156). This holding follows the uniform decisions of this Court and the courts of California to the effect that the confirmatory decrees of the Board of Land Commissioners must be read as common law instruments. *United States* v. *Pacheco, supra; San Francisco Sav. Union* v. *Irwin, supra; Higueras* v. *United States,* 5 Wall. 827, 834; *Valentine* v. *Sloss,* 103 Cal. 215 (1894).

The reason for the rule is plain. The Board had before it a petition in which title to the whole of

the island "in all its extent" was sought to be confirmed. (U. S. Ex. D-1, R. Vol. III, p. 1; R. Vol. II, pp. 384–393.) It was the duty of the Board to ascertain and settle the extent of the title, pursuant to "the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived." Act of March 3, 1851, c. 41, sec. 11, 9 Stat. 631. As the court below pointed out (R. Vol. V, p. 156), the Board functioned "in a common law atmosphere," and it must be presumed that pursuant to the command of the statute the Board took judicial notice or made other appropriate inquiry into the applicable provisions of the Mexican law, usages, and customs, applied them to the Castro grant, and then wrote its decree in the language of the common law.

In further answer to petitioners' suggestion, it is the position of the Government that there is nothing in the ancient Mexican law which prohibited Governor Alvaredo from granting to Castro the entire island down to the line of ordinary high tide and this, we submit, was done. Moreover, even if the lands confirmed were limited to the line of the highest high tide, those here involved would be included, since the record shows an unbroken shore line around the entire area claimed by the Government which in 1852 was from 1.4 to 2.5 feet above even that line. The trial judge did not indicate his views as to the requirements of Mexican law and made no finding as to the elevation of the

marsh lands. The circuit court of appeals declined to "consider the factual argument beyond saying that the record leaves the matter substantially in doubt" (R. Vol. V, p. 156). Nevertheless, petitioners now ask this Court "to dispose of the cause by determining the fact issue" (Br. 63), and advance argument in support thereof in an appendix to their brief (Br. Appendix A, pp. i–xvii). In view of the absence of findings below, we presume that this Court will not review the evidence, but, should the Court deem the matter relevant, we fully show in the Appendix, *infra*, pp. 67–73, that petitioners' contentions are untenable both as to the requirements of Mexican law and as to the elevation of the marsh lands.

B. *The extent of the confirmed grant may not be established by evidence of its ancient reputation*

Petitioners seek to overcome the effect of the mean high water boundary provided for in the confirmation decree by contending that the Board's description of the area confirmed contains two calls—one for "the place called Isla de la Yegua or Mare Island" and the other for the Island "bounded by the water's edge," and that the first one must be accepted as controlling because otherwise the result would be to "expand the Castro grant more than fivefold" (Br. 63–70). This contention is untenable for several reasons:

1. In the first place, we think it clear that the reference to the area confirmed as being the place which is "called 'Isla de la Yegua' or 'Mare

Island' " is not a conveyancer's term which was intended to limit the land described to that area which was then known, or which could be shown nearly 100 years later to have been known, by common reputation as Mare Island. Petitioners cite no case, and we have found none, holding that proof of the precise boundaries of a Mexican grant can be established by reputation evidence as to the area which comprised the grant. Precision in the location of the exterior boundaries of Mexican grants has always been deemed essential; otherwise the grant would fail for uncertainty. *Sena* v. *United States,* 189 U. S. 233, 236, 238, 239; *Arivaca Land & Cattle Co.* v. *United States,* 184 U. S. 649, 652, 653; *Pinkerton* v. *Ledoux,* 129 U. S. 346, 354; *O'Hara* v. *United States,* 15 Pet. 275, 283. Community understanding is altogether too vague a criterion for fixing accurately the exterior limits of any grant or conveyance.

The dissenting judge below expressed the view that the Government's title is limited to the area which was commonly known as Mare Island in 1855, because he was persuaded by certain dictionary definitions of the word "island," cited by petitioners (Br. Appendix, pp. xvii–xviii), that the boundaries given in the decree—"being an Island is bounded by the water's edge"—do not necessarily import a tide water boundary (R. Vol. V, p. 168). We think it is clear, however, that the generally accepted definition is that an island is a body of land entirely sur-

rounded by a natural and constant flow of water and not one that is surrounded by swamp and overflowed lands as defined by the Swamp Lands Act. See "Island," as defined in Bouvier's Law Dictionary; Encyclopedia Americana (1919); New International Encyclopedia (1913); and Webster's International Dictionary; *McBride* v. *Steinweden*, 72 Kan. 508, 515 (1906); *State* v. *Barco*, 150 N. C. 792, 797 (1909); *Payne* v. *Hall*, 192 Iowa 780, 789 (1921); *Zeller* v. *American International Corporation*, 292 Fed. 822, 826–827 (C. C. A. 3).

2. As we have shown, the grant of an island "bounded by the water's edge" is a grant with a specific boundary and conveys the entire area to the line of ordinary high tide just as if that boundary had been delineated by metes and bounds. Accordingly, even if it might be said that the decree contains two calls, one specific and the other general, under elementary principles of conveyancing law the specific boundary must control. *Prentice* v. *Northern Pacific Railroad*, 154 U. S. 163, 174; cf. *Valentine* v. *Sloss*, *supra*. Indeed, the call for a boundary at the line of mean high tide is a call for a natural boundry.[12] Such a boundary is of the highest character and takes precedence even over calls for courses and distances, as well as over specifications of quantity, which may be stated

[12] Cf. *nunc pro tunc* decree of District Court affirming the decree of the Board of Land Commissioners (U. S. Ex. D–2, R. Vol. III, p. 3; Vol. II, pp. 384–393: "Mare Island, with its natural boundaries").

in the granting instrument. *United States* v. *State Investment Co.*, 264 U. S. 206, 211; *United States* v. *Hancock*, 133 U. S. 193, 196; *Higueras* v. *United States*, 5 Wall. 827, 835; *Lodge's Lessee* v. *Lee*, 6 Cranch. 237; *More* v. *Massini*, 37 Cal. 432, 436–437; *De Arguello* v. *Greer*, 26 Cal. 615, 632.[13]

3. We show hereinafter at pages 32–35 that the record does not support petitioners' contention (Br. 65–67) that the decree, under the holding of the court below, enlarged the scope of the Castro grant. But even if the grant covered less than the decree, resort to evidence of ancient reputation as to the extent of Mare Island would not be permissible to modify the specific boundary named. This Court has uniformly held that where a decree specifies the boundaries of the tract to which title is confirmed, "it is conclusive not only on the question of title, but also as to the boundaries which it specified." *United States* v. *Hancock*, 133 U. S. 193, 196; *United States* v. *Coronado Beach Co.*, 255 U. S.

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[13] The cases cited by petitioner, *Parker* v. *Kane*, 22 How. 1; *Wise* v. *Watts*, 239 Fed. 207 (C. C. A. 9); *Piper* v. *True*, 36 Cal. 606 (1869); and *Haley* v. *Amestoy*, 44 Cal. 132 (1872), are not to the contrary. In *Parker* v. *Kane* this Court held that the specific designation of lots one and six prevailed over the general description "being that part of the northeast quarter lying east of the Milwaukee River," where the lots comprised a portion of that quarter. The other cases are but applications of the familiar maxim in conveyancing "*falsa demonstratio non nocet*" under which, where the particular description covers land which the grantor could not possibly have granted, the court will not let the grant fail if by resort to the general description it is possible to effectuate the intention of the grantor.

472, 487–488; *Knight* v. *U. S. Land Association,* 142 U. S. 161, 184; *Higueras* v. *United States,* 5 Wall. 827, 830, 838; *The Fossat Case,* 2 Wall. 649, 710; *United States* v. *Billing,* 2 Wall. 444, 448; *United States* v. *Halleck,* 1 Wall. 439, 455–456; *Hogan* v. *United States,* 72 F. (2d) 799, 805 (C. C. A. 9). And petitioners concede (Br. 67) that the decree, "no matter how erroneous," is conclusive.

In view of this concession, the reasons for the rule followed in the cases cited need only be indicated. The Board of Land Commissioners was created by the Mexican Claims Act of 1851 "to ascertain and settle the private land claims in the State of California" pursuant to the obligation assumed by the United States under the treaty of Guadalupe Hidalgo to guarantee Mexican property rights in the annexed Territory. Unless the decrees of the Board were thereafter to be accepted as "conclusive," as provided in Section 15 of the Mexican Claims Act, the whole purpose of the statute would fail. Accordingly, despite the countless times that in one guise or another attempts have been made to go behind these decrees to show that the grant confirmed should have included less or more, the courts have uniformly regarded them as final.

4. Finally, we submit that the trial court's finding that the swamp lands were not known "by the name of Mare Island" in the 1850s (R. Vol. I, p. 261) is not supported by the record. On the con-

trary, it was abundantly shown that the whole body of tule land has uniformly been treated and claimed as a part of Mare Island. In the grant Castro claimed Mare Island "in all its extent" (R. Vol. I, pp. 21, 260); the Sloat Board correspondence refers to Mare Island "with all its appendages" (R. Vol. III, p. 54) and to "a large tract of tule extending toward Napa and Sonoma" (R. Vol. III, p. 56); the negotiations with Bissell and Aspinwall show that they wanted five times as much per acre for upland as for "the main body of the tule or low ground" (R. Vol. III, pp. 44, 45); the contract with and deed to the United States covered Mare Island "including all the tule or low land and marsh belonging to the same, or which has ever been reputed or claimed to belong to the same" (R. Vol. III, pp. 67, 71); the bond given to the United States by Bissell and Aspinwall refers to "Mare Island and its appurtenances" (R. Vol. III, p. 78); and the selection and reservation of Mare Island as a navy yard by President Fillmore refers to Mare Island and "its appendages of Tule or Marsh land ordinarily reputed to belong to said island" (R. Vol. III, pp. 59–60).[14]

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[14] See also the report of the Sanger Board (R. Vol. III, pp. 95, 97, 98, 110); the official log of Mare Island (R. Vol. III, pp. 183–184); the Freeman Survey (R. Vol. III, p. 162); the report of the United States Surveyor General for California for 1883–1884 (R. Vol. III, p. 181); and the following documents in the record in *United States* v. *O'Donnell*, No. 487, October Term, 1937: The protests of

Petitioners argue (Br. Appendix xix–xxii) that the appearance of the words "Mare Island" upon the southern tip of the island on most of the maps is proof of the common reputation of its extent in 1855. They rely chiefly upon the cross-examination of Lieutenant Smith in which he explained the general practice of surveyors (R. Vol. II, pp. 497–504). But on re-direct examination Lieutenant Smith made it plain that the placing of the name by cartographers "has nothing to do with the geographical feature as such" (R. Vol. II, p. 523), and certainly, as the same trial court found in the *O'Donnell* case (R. Vol. I, p. 246), "it was no part of the duties or powers of the persons making said maps to impose local place names on said maps in such manner to prejudice the rights of the United States."

Petitioners also attempt to infer from statements made in the Sloat Board Report that the Board was of the opinion that only the uplands were a part of Mare Island (Br. Appendix xxii–xxvi). However, it is clear from the report as well as the Board's letter to the Secretary of the Navy, written a month later, that the Board found the Island to contain "about nine hundred acres *in addition to a large tract of tule extending toward*

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the Commandant in 1873 to State authorities (R. 800–801), the Lightfoot report (R. 602), the Joy Survey (R. 626–627), and Secretary of the Navy Wilbur's letter to the Department of the Interior, dated February 12, 1925 (R. 552–562).

Napa and Sonoma" (U. S. Ex. F–1; R. Vol. III, pp. 26, 56; Vol. II, p. 395). [Italics supplied.] Petitioners also assert that the Sloat Board surveys limit the Island to the uplands. But the drawings accompanying the report of the Board plainly do not purport to include the whole Island. They are merely a proposed plan of the structures and a sketch of the topography of the area covered thereby; moreover, they show at least a portion of the isthmus as part of Mare Island.

It is submitted, therefore, that the United States acquired valid legal title to the tule marsh lands in dispute by virtue of its deed under the Castro grant and that petitioners' effort to establish title in themselves by reputation evidence is without merit either in law or in fact.

II

THE DECISION IN THE IRWIN CASE DOES NOT FORECLOSE THE UNITED STATES FROM ASSERTING ITS TITLE

Petitioners contend (Br. 18–32) that under the doctrine of *stare decisis* the United States is foreclosed from asserting its legal title because of its long acquiescence in the judgment in *San Francisco Sav. Union* v. *Irwin, supra,* holding that the Government's ownership under the Castro grant did not extend to the lands in suit. "Such adjudication," they say, has become "a rule of property—a rule of the particular title—from

which the courts are not free to depart." (Br. 18–19.)[15]

It is the position of the Government that no true "rule of property," which would bar the United States, has resulted from the decision in the *Irwin* case, and that petitioners' argument is, in substance, no more than an attempt to invoke the doctrine of *res judicata*. However, since the United States did not consent to and was not a party to the suit in the *Irwin* case, which was brought against the Commandant of the Navy Yard in his individual, rather than official, capacity (28 Fed. 708, 715), the decision is not *res judicata* as to the United States. *Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. 196, 217, 222; *Hussey* v. *United States*, 222 U. S. 88, and other cases cited *infra*, p. 44. Petitioners concede (Br. 10) that this is true. Indeed, a holding that the *Irwin* case bars the present case, whether such holding be cast in terms of "*res judicata*," of a "rule of property," or in any other guise, would effectively nullify, in this class of cases at least, the firmly established principle that the rights of the United States may not be the subject of judicial determination without its consent.

(a) In order adequately to evaluate petitioners' contention, it is necessary first to analyze the issues decided in the *Irwin* case. As noted above, p. 2, in that case petitioners' predecessor, who claimed

[15] This contention was urged for the first time at the oral argument in the circuit court of appeals.

title to the lands here in dispute under grants from California, brought suit in ejectment against the Commandant of the Navy Yard. The Commandant defended upon four separate grounds:

(1) He contended first that the plaintiff's claim of title under the Swamp Land grants from California was insufficient to maintain ejectment because the Secretary of the Interior had not segregated and identified the lands as swamp and overflowed. The Circuit Court, in an opinion by Mr. Justice Field, rejected this contention and held that the plaintiff was entitled to show the character of the land by parole evidence. Upon appeal to this Court, that was the only question involved, and the Commandant in effect confessed judgment by filing a statement in which it was said "the opinion of the eminent Circuit Justice upon the questions raised by the bill of exceptions, appears to be sustained by the subsequent opinion of this Court in *Wright* v. *Roseberry*, 121 U. S. 488." This Court, accordingly, affirmed *per curiam* by the following decision: "It is conceded by counsel for plaintiff in error that this case is governed by *Wright* v. *Roseberry*, 121 U. S. 488, and the judgment is, therefore, upon the authority of that case, Affirmed." Since the decision in the *Irwin* case, the rule announced in the *Roseberry* decision on the point for which it was cited has been repeatedly repudiated by this Court. See *Rogers Locomotive Works* v. *Emigrant Co.*, 164 U. S. 559; *Michigan Land & Lumber*

Co. v. *Rust*, 168 U. S. 589; *Brown* v. *Hitchcock*, 173 U. S. 473, 476; *United States* v. *Chicago, etc. Ry. Co.*, 218 U. S. 233, 242; *McCormick* v. *Hayes*, 159 U. S. 332; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*, 232 U. S. 186; see also *Sawyer* v. *Osterhaus*, 212 Fed. 765, 769, 773–774 (N. D. Cal.).

(2) The Commandant also defended the ejectment suit on the ground that the United States had acquired valid title by reason of its adverse possession. The Circuit Court held that the evidence of possession was insufficient, but that, in any event, "we doubt very much whether the United States can acquire title by adverse possession" (28 Fed. at p. 715). A few years later, in *Stanley* v. *Schwalby*, 147 U. S. 508, 517, this Court held that the United States could acquire a valid title by prescription, Mr. Justice Field writing a vigorous dissent.

(3) The Commandant also urged in his defense that the lands had been reserved by executive order for naval purposes and therefore did not pass to California. The Circuit Court also rejected this contention. In 1914, however, Judge Van Fleet held to the contrary in *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.), a case involving the adjoining marsh lands which were reserved by the order of President Fillmore in 1853 (R. Vol. III, p. 59).

(4) Finally, the Commandant defended on the ground that title to the lands had passed to the

United States under the Castro grant as confirmed by the Board of Land Commissioners. The Circuit Court overruled this contention, but did so upon the basis of the particular evidence and not upon the basis of any principle of law here in dispute. This Court, as already indicated, did not pass upon the contention, since it was not urged by the Commandant.

The Circuit Court found from the testimony that "the land was subject to periodical overflow by the rising of the tides" (28 Fed. at 712), and concluded as follows:

> * * * the title recognized was only to the island, "bounded by the water's edge." * * * By the common law—and by that law must decrees written in the English language be interpreted—the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark, over which the daily tides ebb and flow. *U. S.* v. *Pacheco*, 2 Wall. 589; 3 Kent Comm. 427. If we could pass over the language of the decree, and apply the rule of the civil law, * * * the extent of the land of the island susceptible of private ownership would be less than under the rule of common law. Under neither could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides. Such ownership was all that was conceded

> by the grant to Castro, and the decree affirming the claim of his grantees under it. Large portions of the land in controversy are also separated from the island by navigable sloughs. (28 Fed. at 713.)

The holding that the lands in suit were not covered by the confirmation decree thus appears to have been based on the view that they were below the line of ordinary high tide, and, therefore, without the boundary specified in the decree. The court held that the decree should be read as a common, rather than civil, law instrument, but was persuaded that in either case it did not include the lands in question, since the court considered that under both the common and civil law lands below ordinary high-water mark were not susceptible of private ownership.

Petitioners dispute this interpretation of the decision in the *Irwin* case. They say (Br. 29–30) that the court did not find that the lands were below mean or ordinary high-water mark because such a holding would have meant that the lands were tidelands rather than swamp and overflowed lands, and, therefore, passed to California as an attribute of state sovereignty rather than under the Swamp Lands Act. It is clear from the opinion, however, that the court was not concerned with whether the lands were swamp and overflowed or tidelands, since in either event they would have passed to California if they were not a part of the Castro grant.

See *San Francisco* v. *Le Roy,* 138 U. S. 656, 671; *Knight* v. *U. S. Land Association,* 142 U. S. 161, 183–184; *United States* v. *Coronado Beach Co.,* 255 U. S. 472, 487; *Borax, Ltd.* v. *Los Angeles,* 296 U. S. 10, 15. It is equally clear that the court was of the view that all lands above the ordinary high-water mark were included in the grant to Castro and the decree affirming the claim of his grantees under it.

Petitioners now concede (Br. 28) that the lands in suit have always been above the line of ordinary high-water mark; indeed, they even assert (Br. 28–29) that the evidence before the court in the *Irwin* case showed that "all of the lands were, just as we have admitted them to be, above ordinary high water mark." In effect, therefore, they concede that the decision in that case was erroneous.

In sum then, we have a decision which, as we have shown, is admittedly wrong on the facts and which, in so far as it laid down any principles of law other than those which are in accord with our construction of the confirmation decree, has been repudiated by this and other courts. No "rule of property" barring the instant suit can be said to have arisen from such a decision. If the opposite were true, it would seem that the United States should have been likewise barred in the *O'Donnell* case, since the holding in the *Irwin* case as to the extent of the Castro grant and confirmation decree was equally applicable to the

swamp lands there involved.[16] Indeed, if a "rule of property" can ever be based upon a decision of a question of fact, it would seem that the *O'Donnell* case furnishes a "rule of property" in favor of the Government quite as strong as the "rule of property" in favor of petitioners sought to be derived from the *Irwin* case. For, as we have indicated (*supra*, pp. 3–4, 16), if the decision in the *O'Donnell* case that, as a factual matter, the lands there in suit were part of the Castro grant is accepted as binding in this case, it necessarily follows that the lands here in suit were also a part of the grant.

(b) By a "rule of property" is meant, not "a rule of the particular title", as petitioners assert (Br. 19), but a legal principle governing the ownership and devolution of property. It amounts to no more than a strict application of the doctrine of *stare decisis*. *United States* v. *Standard Oil Co. of Calif.*, 20 F. Supp. 427, 455 (N. D. Cal.), affirmed, 107 F. (2d) 402, 415 (C. C. A. 9), certiorari denied, 309 U. S. 673; *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555, 583. "It relates only to questions of law" (2 Freeman, *Judgments* (5th ed., 1925) sec.

[16] It is no answer to urge, as petitioners apparently do (Br. 19), that the *O'Donnell* case, unlike the instant, did not involve the same lands as those involved in the *Irwin* case. The principle of the "rule of property" is, of course, neither the same as *res judicata* nor as "the law of the case", but "embodies the legal maxim that a principle or rule of law which has been established by the decision of a court of controlling jurisdiction will be followed in other cases involving a similar situation." 2 Freeman, *Judgments* (5th ed., 1925), sec. 630, p. 1329.

630, p. 1329) and does not foreclose subsequent factual inquiries as to true ownership.

The distinction may be clearly illustrated by the very cases cited by petitioners (Br. 19–23). Thus, in *United States* v. *Title Insurance & Trust Co.*, 265 U. S. 472, upon which they primarily rely (Br. 19–21), this Court refused to re-examine the rule of law established by prior decision to the effect that Indian claimants under Mexican grants were, like all other grantees, required to present their titles for confirmation to the Board of Land Commissioners. Obviously, a reversal of that rule would have had a far-reaching effect. The Court accordingly rested upon its prior decision as a "rule of property." This, however, does not support the contention of petitioners, because they do not rely upon any principle of law established by the *Irwin* case. They rely instead upon the particular result, although based, as we have shown, upon a factual issue which was decided upon evidence different from that here present and which petitioners concede would have to be decided differently upon the present record.

Similarly, in each of the other cases where petitioners cite, the plaintiffs sought to have a legal principle overruled and a different principle applied to facts substantially the same as those involved in the earlier case; the decisions stand for no more than the familar doctrine that where titles to land may be affected the courts strictly adhere to the doctrine of *stare decisis*. None of them

stands for the proposition urged by petitioners that in a suit between different parties a court will not reexamine the facts with respect to a chain of title or receive new evidence as to the validity or extent of a grant. Cf. *Richardson* v. *Schwoon*, 3 Tenn. App. 512, 534, 540 (1925); *Magoon* v. *Davis*, 84 Me. 178 (1892); *German Protestant Orphan Asylum* v. *Barber Asphalt Pav. Co.*, 26 Ky. L. 805, 808 (1904).

A contention similar to that urged by the petitioners was rejected by this Court in *Hussey* v. *United States*, 222 U. S. 88. In that case, the Supreme Court of California had found in a prior suit against a government officer, who had been represented by a United States district attorney pursuant to direction of the Attorney General and the Secretary of the Treasury, that the owner of a one-half interest in community property had not ratified the sale to the United States. In a subsequent suit, the Court of Claims accepted the principles of community property law enunciated by the California court, but disagreed as to the facts and found that there had been a ratification. On appeal to this Court, the plaintiff urged, as petitioners do here, that "the judgment of the Supreme Court of California became a rule of property and conclusive of the validity of the title" (222 U. S. at pp. 92–93). This Court held, however, that the contention "is not tenable" (*id.* 93) and rested its decision simply on the ground that the Government is not concluded by the judgment in a prior suit to which it did not consent

and was not a party. The instant case calls for a similar determination. *Carr* v. *United States*, 98 U. S. 433, *United States* v. *Lee*, 106 U. S. 196, 217, 222; see *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *United States* v. *Candelaria*, 271 U. S. 432; *Privett* v. *United States*, 256 U. S. 201; *Priest* v. *Las Vegas*, 232 U. S. 604, 611; *Succession of Barth*, 178 La. 847 (1934).

III

THE STATUTE OF LIMITATIONS DOES NOT BAR THE CANCELLATION OF THE SWAMP PATENTS ISSUED IN 1896 AND 1910

The Circuit Court of Appeals correctly overruled (R. Vol. V, pp. 161–162) petitioners' contention that the Act of March 3, 1891, c. 561, sec. 8, 26 Stat. 1095, 1099, is a bar to the present suit insofar as it seeks the cancellation of the two swamp patents isued in 1896 and 1910.[17] That Act provides:

> * * * suits by the United States to vacate and annul any patent * * * shall only be brought within six years after the date of the issuance of such patents.

In substance, petitioners' argument on this point may be stated as follows: Even though the United States acquired a good title from Bissell

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[17] No contention is made that this statute bars cancellation of the patent issued on April 26, 1924 (R. Vol. III, p. 196), since the six-year period had not run at the time of the institution of this suit, April 22, 1930.

and Aspinwall, it conveyed certain portions of the lands away by its patents of 1896 and 1910, and the statute now bars the Government from recovering such lands. Unless this be the argument, the contention is meaningless, for the United States admits that if the lands were not included in the deed to it, petitioners' swamp land patents are valid irrespective of any statute of limitations.

The argument overlooks important and controlling considerations. It is firmly settled that the Swamp Lands Act was a grant *in praesenti*. *United States* v. *O'Donnell*, 303 U. S. 501, 509. And since the United States did not acquire its title from Bissell and Aspinwall until January 4, 1853, it obviously did not convey the lands to California under the Swamp Lands Act, which was enacted on September 28, 1850. As this Court said in the *O'Donnell* case (p. 510), the Swamp Lands Act, by its terms, "could not include lands which the Government had not acquired." Consequently, since the lands did not pass under the Swamp Lands Act, and there is no other statute authorizing their disposal, petitioners' patents are worthless, for it has long been settled that where Congress has made "no provision" for the sale of the lands, a purported patent attempting to convey them "would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed." *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641, 646; *United States* v. *Schurz*, 102 U. S. 378,

404; *Steel* v. *Smelting Co.*, 106 U. S. 447, 452; *Davis's Administrator* v. *Weibbold*, 139 U. S. 507, 529. Such a patent "is a simple nullity" (*United States* v. *Conway*, 175 U. S. 60, 68), and "it remains open to the United States in this or any other appropriate proceeding, to show that the lands did not pass under the Swamp Lands Act." *United States* v. *O'Donnell*, 303 U. S. at 509; *Work* v. *United States*, 23 F. (2d) 136, 138 (App. D. C.).

Accordingly, it is clear that the limitation provision of the Act of 1891 is wholly inapplicable to the lands here in dispute, for, as this Court has consistently held, that Act is "strictly a part of the public land laws" (*United States* v. *Minnesota*, 270 U. S. 181, 196) and is confined in scope to "public land of the United States," that is, to land "open to sale and conveyance through the land department." *United States* v. *Winona &c. R. R.*, 165 U. S. 463, 476; *Northern Pac. Ry. Co.* v. *United States*, 227 U. S. 355, 367; *United States* v. *Whited & Wheless*, 246 U. S. 552; *Newhall* v. *Sanger*, 92 U. S. 761; *La Roque* v. *United States*, 239 U. S. 62, 68. As this Court pointed out in the *O'Donnell* case, 303 U. S. at 510, "It is a familiar principle of public land law that statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition * * *."

Petitioners contend, however (Br. 33), that "this Court has held that a claim of want of jurisdiction in the Land Department affords no defense or ex-

ception to the statute." They cite *United States* v. *Chandler-Dunbar Co.*, 209 U. S. 447. But, as the court below held, the *Chandler-Dunbar Co.* case "is readily distinguishable" (R. Vol. V, p. 162), and nothing that was there said may be construed as a departure from the settled rule that "the question of jurisdiction, that is, of the competency of the Department to act upon the subject matter, is always open for judicial determination." *Borax, Ltd.* v. *Los Angeles*, 296 U. S. 10, 18; *Smelting Co.* v. *Kemp*, 104 U. S. 636.

The lands in the *Chandler-Dunbar* case were "in kind open to sale and conveyance through the Land Department" (209 U. S. at p. 450) under the Act of March 1, 1847, c. 32, 9 Stat. 146, which authorized the disposition of lands within the Lake Superior Land District to preemptors and script locators. See *United States* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, 33, 36 (C. C. A. 6). In other words, in that case there was a statute which, apart from the question of the Presidential reservation, authorized the Land Department to dispose of the lands. In the present case, there is no such statute. The Swamp Lands Act no more authorized the Land Department to dispose of the lands in suit than it did any other after-acquired lands purchased by the United States for military uses, federal building sites, or for any other purpose.

Petitioners erroneously assume that the Land Department would have had no jurisdiction to issue

a patent to the lands in the *Chandler-Dunbar* case "if the land was in fact reserved at the time of the patent" (Br. 33). The very point upon which that case turned was that the patents were invulnerable because the lands, "whether reserved or not," were "in kind open to sale and conveyance through the Land Department" under the Act of March 1, 1847. In other words, the *Chandler-Dunbar* case would be applicable to the facts here only if the Government were relying upon the reservation by President Fillmore (R. Vol. III, p. 59) to show that petitioners' lands were not patentable, and there were some statute like the Act of March 1, 1847, authorizing disposition of the lands. Cf. *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, 32.

Relying upon the dictum in *United States* v. *Coronado Beach Co.*, 255 U. S. 472, to the effect that the Government's attempt in that case to go behind the patent issued for a confirmed Mexican grant was foreclosed by the Act of March 3, 1891,[18] petitioners argue that the statute is not limited to public lands of the United States (Br. 35). In

[18] That the sentence from the opinion upon which petitioners rely was *obiter* seems clear. The case was brought pursuant to statute as a special proceeding to determine and condemn private rights in North Island in San Diego harbor. The defendants claimed under a confirmed Mexican grant for which a patent was issued and the Court held, as the basis for its decision, that the boundaries fixed by the decree of confirmation were conclusive, citing *Knight* v. *U. S. Land Association*, 142 U. S. 161; *San Francisco* v. *Le Roy*, 138 U. S. 656; and *Beard* v. *Federy*, 3 Wall. 478. (See Point I, *supra*.)

that case, however, the Government argued that the Land Department exceeded its jurisdiction in issuing the patent, not because there was no statute authorizing the disposal of the lands, as is the case here, but because they were tidelands, which prior to the admission of California as a state were "public lands" of the United States and should not have been conveyed to the confirmee. (See Argument of Counsel, 255 U. S. at p. 478.) Hence, even if the Government's position on the merits had been sound, the Court correctly observed that under the *Chandler-Dunbar* case, as well as the other cases we have cited, holding the statute applicable to public lands, the attack upon the patent was barred by the statute. Nothing in the case, however, remotely supports petitioner's contention that the statute is applicable to all patents issued for lands which the United States acquires by private purchase for military purposes and which Congress has not authorized the Land Department to convey.[19]

Petitioners' argument that "If the holding below be correct, no title under the Swamp Land Act is protected by the statute of limitations" (Br. 39) is patently frivolous. As we have pointed out

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[19] *Hogan* v. *United States*, 72 F. (2d) 799, 806–807 (C. C. A. 9), certiorari denied, 295 U. S. 752, and *Putnam* v. *Ickes*, 78 F. (2d) 223, 227–228 (App. D. C.), certiorari denied, 296 U. S. 612, also cited by petitioners (Br. 35), are not in point for each of them stands only for the rule that decrees of confirmation and patents issued pursuant thereto are conclusive.

above, in invoking the statute of limitations petitioners are not asserting title under the Swamp Land Act, but, on the contrary, they claim that even though neither the Swamp Lands Act nor any other act of Congress authorized the disposal of the lands in suit, their patents must be held good. Such a contention twists the Act of 1891 from a statute of repose, which it was intended to be, into a sweeping conveyance and results in the unthinkable consequence that, after six years, the United States would be powerless to attack any patent, however obtained and regardless of the site covered.

Accordingly, we submit that, since the Swamp Lands Act was a grant *in praesenti,* any patent issued by the Land Department under the purported authority of that Act to lands acquired after its passage is, under the authorities we have cited, a "nullity" and that a suit to cancel it is in no way barred by the limitations of the 1891 Act.

IV

THE UNITED STATES IS NOT BARRED FROM THE RELIEF IT SEEKS BY ESTOPPEL OR BY ANY OTHER PRINCIPLE OF EQUITY.

Petitioners contend that the United States should be denied relief both under "general principles of equity" (Br. 40–49, 50) and under the doctrine of equitable estoppel (Br. 51–62). This contention is predicated upon (1) the Government's "acquiescence" in the "definitive decision" of this Court in the *Irwin* case "as to this identical title";

(2) the issuance of patents by the Land Department; and (3) the action of the Navy Department (a) in maintaining the present Navy Yard fence "ever since 1914", and (b) in filing a map with county officials in 1913 which did not include the tule marsh lands as part of the area over which the United States claimed exclusive jurisdiction (Br. 44). The district court expressly declined to pass upon the merits of petitioners' contention (R. Vol. I, p. 169), and the court below overruled it (R. Vol. V, pp. 163–166). We shall show that the United States is not barred from the relief it seeks either in whole or in part by estoppel or any other recognized principle of equity.

1. *The United States is not barred by "general principles of equity."*—It is true that the United States is, generally speaking, subject, as a suitor, to the general principles of equity. See *Brent* v. *Bank of Washington*, 10 Pet. 596, 614, cited by petitioners (Br. p. 45). This rule is, however, subject to exceptions. As we show more fully hereinafter (pp. 54–56, 57–61, 63–65), laches and estoppel, both doctrines of equity, apply to the United States only to a limited extent, if at all. Nor does the rule mean, as petitioners urge, that the legal rights of the United States are to be determined upon general notions of fairness without regard to precedent or established principles.[20] Accordingly it gains

[20] "Nor would a chancellor at the present day assume to decide the facts of a controversy according to his own standards of right and justice, independently of fixed rules, he

petitioners nothing merely to characterize the decree below as a "grave injustice," "grossly inequitable," "against all conscience," as an "unusual spectacle" and as a "phenomenon of a court of equity figuratively throwing up its hands and declaring that it is without power to stay its own action in perpetrating this injustice" (Br. pp. 40, 41, 44, 50). *Bond* v. *Hopkins,* 1 Schoales & L. 413, 429 (1802); *Gee* v. *Pritchard,* 2 Swanston, 402, 414 (1818); Pomeroy, *Equity Jurisprudence* (5th ed., 1941) sec. 62, p. 82.

We think it apparent that petitioners' argument amounts to no more than a new guise for their contention at the trial (R. Vol. I, pp. 37, 94–95; cf. pp. 168, 258–259), which they abandoned in the court below (see R. Vol. V, p. 161), that their undisturbed possession of the lands "for 40 years" (Br. pp. 3, 16, 27) has ripened into a valid prescriptive title. It is settled, however, that "mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States" *Sparks* v. *Pierce,* 115 U. S. 408, 413; *Oaksmith's Lessee* v. *Johnston,* 92 U. S. 343, 347.[21] The reason for the rule is two-

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would not attempt to exercise the *arbitrium boni viri*; on the contrary, he is governed in his judicial functions by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges." *Pomeroy's Equity Jurisprudence* (5th ed., 1941), sec. 47, p. 62.

[21] To the same effect see *Morrow* v. *Whitney,* 95 U. S. 551, 557; *Northern Pac. Ry. Co.* v. *McComas,* 250 U. S. 387, 391; *Hays* v. *United States,* 175 U. S. 248, 260; *Tyee Consolidated*

fold. In the first place, the Constitution (Art. IV, sec. 3, cl. 2) gave Congress alone "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," and, therefore, "Having the power of disposal and of protection, Congress alone can deal with the title * * *." *Jourdan* v. *Barrett*, 4 How. 168, 184. In the second place, the principle *nullum tempus occurit regi* "is applicable to all governments * * * and is essential to a preservation of the interests and property of the public." *Gibson* v. *Chouteau*, 13 Wall. 92, 99; *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 158.

This rule, we submit, becomes largely nugatory if a court of equity will enforce a colorable title, like that asserted by petitioners, because of a reluctance to oust intruders upon government property. *Lindsey* v. *Miller*, 6 Pet. 666, 673. Legal title to the lands in suit being vested in the United States, only Congress can convey them away (10 Op. A. G. 34); and the courts may not, any more than executive officers, undertake to apply equitable principles against the United States where, as here, it sues in its sovereign capacity to preserve the integrity of its military

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Min. Co. v. *Langstedt*, 136 Fed. 124, 127 (C. C. A. 9); *Reed* v. *St. Paul, M. & M. Ry. Co.*, 234 Fed. 123, 124 (W. D. Wash.); cf. *Stanley* v. *Schwalby*, 147 U. S. 508, 517; *United States* v. *Dastervignes*, 118 Fed. 199 (N. D. Cal.), affirmed, 122 Fed. 30 (C. C. A. 9).

reservations which are held "in trust for all the people." *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Pan-American Co.* v. *United States,* 273 U. S. 456, 506; *Causey* v. *United States,* 240 U. S. 399, 402; *Heckman* v. *United States,* 224 U. S. 413, 446–447.

If this were a controversy between private parties, petitioners' plea that the plaintiff should not be permitted "to wrest from the private owners [sic] the lands they have so long held and enjoyed" (Br. 4) might be upheld on the ground that the parties have proceeded on the basis of a mutual mistake and that it would work an undue hardship upon petitioners to require them to vacate the lands. But this argument has been urged against the Government before without avail except in instances where Congress has enacted compensatory relief. The underlying reasons are stated in the opinion of the Court in *Causey* v. *United States, supra.* That was a suit brought by the United States to recover the title to lands which had been patented. The defendant contended that the bill should be dismissed because the United States did not offer to return the scrip which it had received for the land. In answer to this contention, the Court said (p. 402):

> * * * the Government in disposing of its public lands does not assume the attitude of a mere seller of real estate at its market value. These lands are held in trust for all

> the people, and in providing for their disposal Congress has sought to advance the interests of the whole country by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development and utilization. And when a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded. [Citing cases.]

See also *United States* v. *Insley*, 130 U. S. 263, 266; *Lee Wilson & Co.* v. *United States*, 245 U. S. 24, at 32; *Utah Power & Light Co* v. *United States*, 243 U. S. 389, 409; *Jeems Bayou Club* v. *United States*, 260 U. S. 561; *Sutton* v. *United States*, 256 U. S. 575; *Crespin* v. *United States*, 168 U. S. 208; *Hayes* v. *United States*, 170 U. S. 637.

Furthermore, contrary to the statement made in the concurring opinion of the court below (R. Vol.

V, p. 166), the judgment may not be characterized as "grossly inequitable." As the court below observed (R. Vol. V, p. 165), the rights of those claiming under the state have been from the beginning "shrouded in doubt and uncertainty." See *San Francisco Sav. Union* v. *Irwin*, 28 Fed. 708 (C. C. Cal.), affirmed 136 U. S. 578; *Bouldin* v. *Phelps*, 30 Fed. 547 (C. C. N. D. Cal.); *Sawyer* v. *Osterhaus*, 212 Fed. 765 (N. D. Cal.); *Work* v. *United States*, 23 F. (2d) 136 (App. D. C.); *United States* v. *O'Donnell*, 303 U. S. 501; and see pp. 11–14, *supra*. And petitioners and the companies which insured their supposed title (R. Vol. II, pp. 710–711) had means of knowing that Congress had not authorized relinquishment of the lands.

2. *The United States is not barred by equitable estoppel.*—Petitioners misread the opinion below as holding "that the Government is not subject to equitable estoppel" and say that "the essence of the holding is * * * that upon some supposed principle of public policy the sovereign is not subject to the defense" (Br. 51). The Circuit Court of Appeals announced no such sweeping rule and it is not necessary for us to contend that the United States is in all cases immune from this defense; it is significant, however, that petitioners have been unable to cite, and we have been unable to find, a single case in which this Court has held the United States estopped, despite the vast number of cases

in which that contention has been urged.[22] On the other hand, this Court has not declared that the United States can never be estopped.

But regardless of whether estoppel can, under any circumstances, operate against the United

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[22] Of the cases examined, that most closely presenting a holding of estoppel against the United States, although it does not use that term, and although the United States was not a party to the suit, is *Lindsey* v. *Hawes*, 2 Black 554, 560. In *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, 289, however, that case was referred to as resting upon a construction of acts of Congress. Petitioners also cite (Br. 46), *American Propeller, etc., Co.* v. *United States*, 300 U. S. 475, in which this Court refused to allow interest upon the Government's counterclaim for taxes, because demand for payment had not been made as required by statute. No question of equitable estoppel was involved and the quotation from the Court's opinion contained in petitioners' brief is wholly inapplicable to the instant case. See *United States* v. *Shaw*, 309 U. S. 495, and *United States* v. *U. S. Fidelty Co.*, 309 U. S. 506, where the Court held that the doctrine of *United States* v. *The Thekla*, 266 U. S. 328, set forth in petitioners' quotation from the *American Propeller* case, is limited to "claims for collision in admiralty."

Petitioners rely upon two decisions from the Circuit Court of Appeals for the Eighth Circuit, *State of Iowa* v. *Carr*, 191 Fed. 257 and *United States* v. *Denver & R. G. W. R. Co.*, 16 F. (2d) 374, and one from the Sixth Circuit, *United States* v. *Chandler-Dunbar Water Power Co.*, 152 Fed. 25, in which it was held that under the circumstances there presented an equitable estoppel would lie. But see, from those same circuits, *McDonald* v. *United States*, 89 F. (2d) 128 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Fiman* v. *South Dakota*, 29 F. (2d) 776 (C. C. A. 8), certiorari denied, 279 U. S. 841; *Utah Power & Light Co.* v. *United States*, 230 Fed. 328, 342 (C. C. A. 8); *Union Pac. Ry. Co.* v. *United States*, 67 Fed. 975, 979 (C. C. A. 8); *Lake Superior Ship Canal, Ry. & Iron Co.* v. *Cunningham*, 44 Fed. 819, 833 (C. C. W. D. Mich.), affirmed, 155 U. S. 354.

States, it is clear that the majority below held only that in the present suit, the "unauthorized conduct on the part of its [the Government's] officers, or arrangements or agreements by them," upon which petitioners rely, "do not constitute a defense or give rise to an estoppel" (R. Vol. V, p. 165).

Plainly, this holding is correct. Congress has never relinquished the Government's claim of title to the lands in suit. The defense of equitable estoppel is therefore reduced to a charge that the United States is bound by the action or nonaction of its officers. But neither the Secretary of the Navy, the Commandant of the Navy Yard, the General Land Office, nor any other officer of the Government had any authority to relinquish the property rights of the United States in the lands in suit, and under these circumstances it is well established that the United States can neither be bound nor estopped. *Cramer* v. *United States*, 261 U. S. 219; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *Lee Wilson & Co.* v. *United States*, 245 U. S. 24; *Jeems Bayou Club* v. *United States*, 260 U. S. 561.

Utah Power & Light Co. v. *United States, supra*, was a suit in equity by the United States to enjoin power companies from using certain lands of the United States for works for the generation and distribution of electric power, and to recover compensation for past use. The power companies contended that certain statutes authorized their use of

the lands. This contention was resolved against them by the Court. The companies further contended that the United States was barred from challenging their right to use the lands since Government officials had entered into agreements consenting to the construction and operation of the works and had silently acquiesced in the expenditure of huge sums for them. Rejecting this contention, the Court said with respect to the alleged agreements (pp. 408–409):

> * * * Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. *Lee* v. *Munroe*, 7 Cranch 366; *Filor* v. *United States*, 9 Wall. 45, 49; *Hart* v. *United States*, 95 U. S. 316; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 291.

With respect to acquiescence in the construction and operation of the works, the Court said (p. 409):

> * * * This ground also must fail. As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest, *United States v. Kirkpatrick*, 9 Wheat. 720, 735; *Steele* v. *United States*, 113 U. S. 128, 134; *United States* v. *Beebe*, 127 U. S. 338, 344; *United States* v. *Insley*, 130 U. S. 263, 265–266; *United States* v. *Dalles Military Road Co.*, 140 U. S. 599,

632; *United States* v. *Michigan,* 190 U. S. 379, 405; *State ex rel. Lott* v. *Brewer,* 64 Alabama 287, 298; *State* v. *Brown,* 67 Illinois 435, 438; *Den* v. *Lunsford,* 20 N. Car. 407; *Humphrey* v. *Queen;* 2 Can. Exch. 386, 390; *Queen* v. *Black,* 6 Can. Exch. 236, 253. * * * A suit by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or to remove a cloud from it. *Causey* v. *United States,* 240 U. S. 399, 402.

That the officers of the Land Department acted without authority in issuing the patents here involved is evident from the facts hereinbefore discussed. The decision in the *Utah Power & Light Co.* case is, therefore, applicable to their acts. It is conclusive also that the United States would not be estopped even if the officers of the Navy Department affirmatively represented to appellees that the Government had abandoned its claim of title to the lands. See *Utah* v. *United States,* 284 U. S. 534, 545–546.

Indeed, it is doubtful whether the United States would be estopped in this case even under the principles applicable in a suit between private individuals. It has long been settled that before there can be an estoppel affecting title to land the legal owner must be guilty of "intentional deceit" or at least of "that gross negligence which is evidence of

an intent to deceive". 3 Pomeroy, *Equity Jurisprudence* (5th ed., 1941), sec. 807, p. 202, and cases cited. As this Court held in *Brant* v. *Virginia Coal & Iron Co.*, 93 U. S. 326, 335–336:

> For the application of that doctrine [equitable estoppel] there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, "the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. And, therefore, when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 Story's Eq. 391. To the same purport is the language of the adjudged cases. * * *

See also *United States* v. *Standard Oil Co. of California*, 20 F. Supp. 427, 452 (S. D. Cal.), affirmed, *Standard Oil Co. of California* v. *United States*, 107 F. (2d) 402, 416 (C. C. A. 9), certiorari denied, 309 U. S. 673.

The building of a fence, the surveying of the lands, the issuance of patents, and the recording of

maps, the facts relied upon by petitioners, would seem to fall far short of showing either "intentional deceit" or "gross negligence" amounting to fraud. Nor can petitioners claim that they had "no convenient and available means" of knowing "the true condition" of their title (*Standard Oil Co. of California* v. *United States, supra*), for, as Judge Healy observed, "the facts respecting the tidal conditions obtaining on the island were at least within the possibility of knowledge on the part of claimants willing to take note of those conditions or desirous of investigating the available evidence" (R. Vol. V, p. 164). Cf. *United States* v. *Walker River Irr. Dist.* 104 F. (2d) 334, 339 (C. C. A. 9). And petitioners admit that they knew that the judgment in the *Irwin* case was not *res judicata* against the United States (Br. 10).

Petitioners recognize that they may not invoke the doctrine of laches, but many of the facts upon which they base their estoppel argument have to do with the delay of the United States in bringing this suit some 40 years after the decision in the *Irwin* case (Br. 3, 16, 19, 26, 27). Similarly, the fact that the United States has not asserted its title "for half a century" weighed heavily with the trial judge (R. Vol. I, p. 175) and was the sole basis for Judge Denman's observation that the Government's case is "grossly inequitable" (R. Vol. V, p. 166). But it is clear that delay in bringing suit "is not an element of estoppel. It is an element of laches. And laches do not affect the rights of the Government."

United States v. *Standard Oil Company of California, supra,* at p. 454. As long ago as 1824, Justice Story observed in *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735:

> The general principle is, that *laches* is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of *laches* can be applied to its transactions. * * *

Again in *United States* v. *Beebe,* 127 U. S. 338, this Court declared (p. 344):

> The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, *however gross,* in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. * * * [Italics supplied.]

To the same effect, see *United States* v. *Nashville &c. Ry. Co.,* 118 U. S. 120, 125; *United States* v. *Insley,* 130 U. S. 263, 266; *Steele* v. *United States,* 113 U. S. 128, 134.[23]

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[23] If there is any exception to the principle that the United States cannot be barred by laches, it is limited to commercial transactions of the United States. See *Cooke* v. *United States,* 91 U. S. 389, 398; *United States* v. *Bank of the Me-*

Other facts upon which petitioners base their contention that the United States may be estopped deal with the "acquiescence" of the United States while petitioners expended large sums for the purchase and improvements of the land (Br. 19, 26, 42). Any such "acquiescence," however, on the part of Government officials or agents cannot bar the United States from asserting its title to lands validly acquired. *Utah Power & Light Co.* v. *United States, supra,* p. 409; *Morris* v. *Bean,* 146 Fed. 423 (C. C. Mont.), affirmed, 221 U. S. 485; *United States* v. *Conrad Inv. Co.,* 156 Fed. 123 (C. C. Mont.), affirmed, 161 Fed. 829 (C. C. A. 9); and cases cited *supra,* pp. 39, 64. "No estoppel arises from mere delay, acquiescence, or nonaction, even if it results in inducing expenditures." *United States* v. *Standard Oil Company of Calif., supra,* at p. 454.

It is therefore submitted that the United States is not barred from quieting its legal title under the doctrine of equitable estoppel. To hold otherwise would require the overthrow of firmly embedded principles of public land law "having their roots in necessary public policy" (R. Vol. V, p. 165).

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tropolis, 15 Pet. 377, 392; *United States* v. *Barker*, 12 Wheat. 559, 561. "Laches is not imputable to the government, in its character as sovereign, by those subject to its dominion." *Cooke* v. *United States*, *supra*, at 398. That the present suit is brought by the United States in its sovereign character is clear. Cf. *United States* v. *Minnesota*, 270 U. S. 181, 194.

CONCLUSION

It is respectfully submitted that the judgment below is correct and should be affirmed. The legal title to the lands in suit has been in the United States since the purchase of them in 1853. There may be circumstances indicating that petitioners, to the extent they are not insured, should be reimbursed by the Government for expenditures in improving the lands or for other costs, but only Congress can so decide. The matter is "beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government." *Lee Wilson & Co.* v. *United States,* 245 U. S. 24, 32.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
OSCAR PROVOST,
RICHARD H. DEMUTH,
H. G. INGRAHAM,
JOHN HEARNE,
Attorneys.

PHILIP BUETTNER,
Attorney,
Office of the Judge Advocate General of the Navy.

APRIL 1942.

APPENDIX

A. NOTHING IN THE MEXICAN LAW IS INCONSISTENT WITH THE GRANT TO CASTRO OF ALL THE LAND ON MARE ISLAND TO THE LINE OF MEAN HIGH TIDE.

Preliminarily, we wish to emphasize that in contending that the lands in suit are not a part of Mare Island, petitioners are, in effect, making a direct attack upon the findings made in the *O'Donnell* case as to the extent of the Castro grant. In other words, petitioners do not contend that the lands in suit were below the "highest high tide" line of Mexican law; rather, they urge only that the narrow isthmus involved in the *O'Donnell* case ~~were~~ was below that line, thereby severing their lands from the highlands of the island. It is the position of the Government, however, that there is nothing in the Mexican law which is inconsistent with the finding made in the *O'Donnell* case that the Castro grant conveyed all the land to the line of mean high tide.

Apart from the testimony of Professor Radin (R. Vol. II, pp. 617–624), petitioners offer nothing that was not urged in the attack made on the findings of fact in that case. Moreover, Professor Radin's testimony adds nothing new, for respondents urged in the *O'Donnell* case,[24] as petitioners do here (R. Vol. II, p. 617), that the court may take judicial notice of the Mexican law, citing

[24] Brief for Respondent, pp. 33–34, Oct. Term, 1937, No. 487.

United States v. *Chaves*, 159 U. S. 452. The whole section of the code provision upon which petitioners rely is as follows (R. Vol. II, p. 623): *Las Siete Partidas*, Part III, Tit. 28, Law IV, Hall, *Laws of Mexico* (1885 ed.) sec. 1466, p. 448):

> Every man who chooses may build a house or cabin upon the seashore as a retreat, and he may erect there any other edifice whatever to serve his purposes; provided he does not thereby interfere with the use of the shore, which everyone has a right in common to enjoy. He may also build galleys there, or any other vessel whatever; or stretch or mend his nets; and when he is there, or employed for or other purposes of a similar nature, no one has a right to disturb him. By the seashore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

Certainly there is nothing in this section which precludes a finding that the Castro grant conveyed the lands to the ordinary high-tide line, perhaps with the right of the public to use the foreshore. Mexico, through its authorities, could grant even the seashore. Cf. *Jover* v. *Insular Government*, 221 U. S. 623, 629–633; *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 486–487; Hall, *Laws of Mexico* (1885 ed.) sec. 1699, p. 515. No special words were necessary for such a grant, nor was any special authorization required under the law. See, for example, *Teschemacher* v. *Thompson*, 18 Cal. 11, 20–21 (1861); *Ward* v. *Mulford*, 32 Cal. 365 (1867). The grant from Gover-

nor Alvarado to Castro conveyed the whole of Mare Island "in all its extent" (R. Vol. I, p. 21), and it is clear that the definition of an island under the civil law is the same as that accepted by the courts of this country, i. e., a body of land entirely surrounded by a natural and constant flow of water. The mere fact that the land may be surrounded by water occasionally or at high tide does not make it an island. *McBride* v. *Steinweden,* 72 Kan. 508, 515 (1906); *State* v. *Barco,* 150 N. C. 792, 797 (1909); *Payne* v. *Hall,* 192 Iowa 780, 789 (1921); *Zeller* v. *American International Corporation,* 292 Fed. 822, 826–827 (C. C. A. 3). In the civil law an island is defined as "a certain portion of land entirely surrounded by the waters of the sea or of a river."[25] See also *Las Siete Partidas* Part III, Tit. 28, Laws XXVII–XXX (Hall's translation, pp. 450–451; Scott's translation, pp. 827–828).[26] Hence it is plain that when Governor Alvarado granted to Victor Castro the whole of Mare Island "in all its extent" he granted an island surrounded by a continuous flow of water and not by sporadic high tides or storm spray, as petitioners urge.

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[25] "ISLA. Cierta porcion de tierra rodeada enteramente de agua por de mar o' por algun rio." Dictionario Razonado de Legislacion y Jurisprudencia. Por Don Joaquin Escriche (Magistrado Honorario de la Audencia de Madrid). Nueva Edicion (Paris, Mexico, 1925), p. 934.

[26] Professor Radin says that Scott's translation is "quite inaccurate" (R., Vol. II, p. 623). But see 14 Amer. Bar Ass'n J., pp. 219, 223–224 (1928). A comparison of the sections relied upon in the two translations fails to disclose any material difference between them.

B. THE ANNUAL HIGHEST HIGH TIDE DID NOT REACH ACROSS THE NARROW NECK OR ISTHMUS

It is the further position of the Government that even if it may be said that the grant to Castro, under Mexican law, extended only to the line of highest high tide, the record nevertheless shows that the elevation of the sand ridge on the San Pablo Bay side of the *O'Donnell* lands was well above even that line. Petitioners' argument is based chiefly upon the testimony of George L. Cross, son of a former claimant to the lands in suit, to the effect that when he was living on the island from 1898 to 1907 he frequently saw the lands in Survey 34 under water (R. Vol. II, pp. 528, 533). From this, they conclude that some half a century earlier, in 1852, the lands were below the line of the highest high tide or, as they put it, the "line of highest high water throughout the year." Obviously, such testimony is wholly without probative value. The issue here is the condition or elevation of the neck of land in 1852, and not in 1900.

While the elevation of the tule marsh lands was but ⅔ to 1 foot above the line of mean high tide (R. Vol. II, pp. 581, 589, 606–607), the testimony shows that a sand ridge barrier extended throughout the length of the isthmus in question,[27] the ele-

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[27] Petitioners contend that, apart from U. S. Exhibit T (R. Vol. IV, p. 28)—which they now argue "is in error" (Br. xvi)—"There is no evidence that there was any sand ridge at the narrows of the neck" (Br. xiii–xvi). Lieutenant Smith of the Coast and Geodetic Survey testified, however, in explanation of an aeroplane map of the island, that this sand ridge "appears very plainly" at a point 6,400 feet from the steam engineering building (R. Vol. II, p. 447) and it

vation of which was above the mean highest high tide. The Court's attention is respectfully directed to U. S. Exhibit T (R. Vol. IV, p. 28; Vol. II, p. 586) prepared under the direction of Captain Carl A. Carlson, and to his explanation thereof (Vol. II, pp. 577–583, 586–597). This exhibit consists of a plat of cross-sections of the land in controversy, made from actual surveys in 1856, 1906, 1917, and 1931, which shows the profiles of the land and tides for each of these years according to the usual engineering method (R. Vol. II, p. 582). The exhibit makes clear that the elevation of the land in 1852 was from 8 to 9.1 feet above mean low water and from 1.4 to 2.5 feet above the spring high tide line, which is the highest high tide line of the year.

Attention is particularly directed to the profile second from the bottom on the exhibit, designated

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is plain from the whole of his testimony, as well as other evidence in the record, that the ridge extended through Survey 34. Thus he was of the positive opinion that the storm barrier, which he identified, was unquestionably the one that existed in 1856 "a little less than 100 feet back from the shore line as surveyed by Rodgers" (R. Vol. II, pp. 601, 602–607). The Rodgers Survey of 1856, as well as the Lawson Survey in 1886, are shown in the Record on a transparent sheet superimposed upon an aerial photograph (R. Vol. IV, p. 30) and, as Lieutenant Smith testified (R. Vol. II, p. 606), these surveys, made 30 years apart, showing a continuous unbroken and almost identical shore line, prove that certainly the same condition existed throughout this isthmus. He further testified that where there is a long fetch of water where the waves will break, such as San Pablo Bay, the waves will build up a sand barrier (R. Vol. II, p. 602) and that if water flowed across it during the highest tides, there would have been some physical evidence by way of a channel, which is not shown on either the Rodgers or the Lawson survey (R. Vol. II, pp. 608–609).

as "station 60," which corresponds to the southern boundary of the so-called "neck" (R. Vol. IV, p. 28). Following the heavy black line, which is drawn to indicate the elevation of the land at this station in 1852 (see explanatory notes "Re: Station 60" at lower right of the exhibit), the Court will readily see that the land in this section was at that time well above the spring high tide, or, to use petitioners' language, the highest high water throughout the year.

It is true, as shown by the enlarged section on Station 2, redrawn to a larger scale at the bottom of the exhibit, that the storms of December 1914 and 1921 caused the tide to rise three feet above the line of mean high tide, or about one-tenth of a foot above the so-called boundary land at Station 60, but such tides are far higher than the annual high tide. Indeed, the witness Cross admitted that the water he saw on the land may have come from such extreme high tides (R. Vol. II, p. 536).[25] But, as the trial court indicated at the trial, we are not "concerned with abnormally high tides" (R. Vol. II, p. 512). Furthermore, if such extreme storm

[25] Cf. the Joy report made pursuant to the direction of the United States Surveyor General in 1922 (No. 487, Oct. Term, 1937, R. p. 626): "The results of my investigations and observations while on the ground lead me to believe that there is no doubt that water at extra high tides, from San Pablo Bay, crossed over the narrow strip of land in secs. 14 and 15, at extra high tides and probably at ordinary high tides with a stiff wind from the southwest, but that the water crossed over the shore of the Bay more in the manner of an overflow, a broad sheet or spillway, without any definite channel, and only in one direction to the northeast away from the Bay."

tides be the criterion by which boundaries may now be determined, titles to land along the whole west coast of California and along both coasts of Florida rest on extremely tenuous grounds.

Petitioners assert (Br. pp. vii–xiii) that three plates introduced in evidence by the Government, showing the tidal regimen for November 1929, and for February and June 1905 (U. S. Ex. R. Vol. IV, pp. 21–23; Vol. II, pp. 572–573) establish their contention because they indicate that the tides rose as much as a foot above mean high tide during those months. But since Exhibit T shows that the elevation of the lands in 1852 was from 2.2 to 3.3 feet above the line of mean high tide, it is clear that these plates completely harmonize and corroborate that exhibit, for each of them shows that during these specimen months the tides did not rise to that elevation. In other words, they plainly disprove the contention that the lands here involved were inundated by the tides several times a month in 1852.

It is therefore submitted that petitioners' entire argument by which they contend that the decree of confirmation is not binding as to them under the ancient Mexican law relating to tide lands is without any tenable basis either in law or in fact.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

No. 848.—October Term, 1941.

Mary W. Stewart, et al., Petitioners, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 25, 1942.]

Mr. Justice Roberts delivered the opinion of the Court.

This is a suit by the United States to quiet its title to a large area of tule marsh lands lying northwest of the Mare Island Navy Yard in San Pablo Bay in California. *United States* v. *O'Donnell*, 303 U. S. 501, was a similar suit to quiet the Government's title to marsh lands lying between the high land on which the Navy Yard is located and the lands in controversy, which terminated favorably to the Government. In both cases the Government deraigned title through a grant by the Mexican Governor of California to one Castro and certain mesne conveyances by Castro and his grantees. In both cases the defendants claimed title under the State of California on the theory that the State acquired the lands under the Swamp Lands Act of September 28, 1850.[1] The *O'Donnell* case involved the validity of the grant to Castro, the validity of the decree of the Board of Land Commissioners confirming that grant, the question of priority of right as between the United States as purchaser of the land granted to Castro and the State of California and its grantees under the Swamp Lands Act. The decision in that case settled these questions in favor of the Government.

In the *O'Donnell* case it was contended that the lands there in controversy were not embraced within the grant to Castro. The District Court found against the contention and the Circuit Court of Appeals approved the finding. We refused to review the concurrent findings of the lower courts.

In the present case, the petitioners do not contest the rulings in the *O'Donnell* case. Their defences are that their lands, which

[1] c. 84, 9 Stat. 519, 43 U. S. C. § 982.

they hold under patents issued for swamp and overflowed lands, under the Swamp Lands Act, were never part of the land granted to Castro by the Mexican Governor and further that, if they were, the decision in *San Francisco Savings Union* v. *Irwin*, 28 Fed. 708, affirmed 136 U. S. 578, constitutes a ruling as to their title which ought now to be followed. In addition, they claim that the action of the United States is barred by the Act of March 3, 1891[2] which prohibits suit by the United States to annul any patent after six years from the date of issue. They also contend that laches, estoppel, and failure to undertake to do equity as a condition of obtaining the desired relief require a decree dismissing the bill.

The case was tried before the same District Judge who presided at the trial of the *O'Donnell* case. Upon the basis of the pleadings and proofs, he made, *inter alia*, the following findings of fact bearing upon the defence that the lands in controversy were not included in the grant to Castro or the confirmation thereof and hence never passed to the United States as ultimate transferee of Castro's title:

That none of the lands involved was ever a part of Mare Island.

That none of these lands was, either at the time of the grant to Castro or at the time of the proceedings for confirmation of the grant, a part of the lands known as, or referred to as, or by the name of Mare Island.

That none of the lands was embraced in or covered by the grant of Mare Island to Castro.

That none of the lands was ever occupied by, or in possession of, Castro.

That none of the lands was claimed as a part of, or to be a part of, Mare Island.

That none of the lands was covered by, or embraced within, the confirmation proceedings or the order of confirmation of the Board or the decree of the District Court confirming the order of confirmation of the Board.

That none of the lands was purchased or acquired by the United States as part of its purchase of Mare Island.

The judge also further made findings that the petitioners' title was derived from the United States through the State of California under the Swamp Lands Act. He concluded the action

[2] c. 561, § 8, 26 Stat. 1095, 1099.

was barred by the Statute of Limitations and that the United States was not the owner of the lands in suit.[3]

The Circuit Court of Appeals reversed the decree by a vote of 2 to 1.[4] The dissenting judge said: "The District Court found, in effect that the 'place' which at the time of the grant to Castro and at the time of the confirmation to Bissell and Aspinwall was called Isla de la Yegua or Mare Island, did not include any of the land here in controversy. The finding is amply supported by evidence."

The majority of the court did not overrule the findings of the District judge above outlined. After making a reference to the evidence they said: "But whatever may be the fact there is no occasion to inquire into the extent of Castro's occupancy, or into the matter of early repute." They held that, whatever the extent of the Mexican grant to Castro, the decree of the Board of Land Commissioners, made pursuant to the Act of March 3, 1851,[5] established a definite boundary—the line of ordinary high water mark—which was controlling. It is conceded that a portion of the marsh lands embraced in Survey No. 34, which are the lands involved in the *O'Donnell* case, are, and have been, above ordinary high water mark. The court held that there was some land above that mark in the narrow neck of land conveyed by Survey No. 34 and connecting the high land on which the Navy Yard is constructed with the large tract of about 7500 acres covered by Survey No. 569, which constitutes the land in this suit. Construing the decree of the Commissioners in accordance with the common law of California in force at the time of the confirmation of the Castro grant, the Court held that the tract confirmed to Castro's grantees comprised not only the high land on which the Navy Yard stands but the narrow strip to the northwestward embraced in Survey No. 34 and the large tract of tule marsh lying still farther to the northwestward embraced in Survey No. 569. On account of the importance of the questions involved we granted certiorari.

We are of opinion that, in the light of the District Court's findings, which are undisturbed, the Circuit Court of Appeals erred in reversing the District Court's judgment. It is evident that the Circuit Court of Appeals accepted, or at least did not

[3] 29 F. Supp. 59.
[4] 121 F. 2d. 705.
[5] c. 41, 9 Stat. 631.

overrule, the findings of the District Judge. If, as we think, these findings were supported by substantial evidence, there is no principle of law which requires a decision that the decree of confirmation extended the tract actually granted to Castro so as to embrace the marsh lands, title to which is in controversy.

The record before the Commissioners shows that, on October 30, 1840, Castro petitioned that he be granted an island called "Mare Island", that the Governor *ad interim* granted his petition on October 31, 1840, and that on May 2, 1841, the Governor of the Californias, one Alvarado, confirmed Castro's ownership in fee of the same island "in all its extent", which he designated as "the Island named La Yegua". There was no evidence before the Commissioners, and none in the trial of this case, to the effect that Castro occupied any portion of the tule marsh in controversy. The testimony before the Commissioners was devoted almost entirely to the question of the authenticity and good faith of the grant to Castro. The only evidence with respect to the size or extent of the island was that given by a witness Vallejo who resided near it. He testified that the island was two and one-half miles in length and contained about half a league of land. This description does not include the marsh land involved in the present case but covers only the high land where the Navy Yard is located.

The petition of Bissell and Aspinwall for a confirmation to them of title to the lands granted to Castro by the Commissioners was filed August 31, 1852. It stated that the subject of the grant was "the island called 'Isle de la Yegua'" and asked that the Commissioners confirm to them the said "tract of land". The decree of the Commissioners, after stating that the claim was valid and the application for confirmation should be allowed, continued: "The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isle de la Yegua' or Mare Island and being an island is bounded by the water's edge."

It is undisputed that the original grant to Castro was governed by the Mexican law and that, under that law, the title of an owner of land bordering on navigable waters ran to the line of the highest high tide. The record contains evidence indicating that, at such highest tide, the neck of land to the northwestward of the high land on which the Navy Yard is located was covered, at least at certain points, by water. This fact could not alter boundaries

definitely fixed by the Commission's decree, which is to be interpreted according to the common law in force in California at the time it was entered. Under the common law, the boundary would be the line of ordinary high water. But the boundary of the Mexican grant is of some significance in determining what the Mexican Governor intended to, and did in fact, grant to Castro, especially as both grant and confirmation referred to the tract as what is named or called Mare Island.

It is to be observed that the decree of confirmation refers not to a tract of land but to a "place" and to the place which "is called" Mare Island.

At the time the decree of confirmation was entered several early maps of the area existed which, although they did not designate Mare Island by any name, showed the high land as entirely surrounded by water. They indicate a channel across the low neck of marsh land to the westward of the high promontory on which the Navy Yard is constructed.

Coming to about the date of the grant and confirmation, we find several significant maps. One of these, made by an Army lieutenant in 1848, shows an actual break at the northerly end of the high land and indicates that, at this point, water covered the land, at least at high tide. The island thus delimited is marked on the map "Mare Island" and the low tule marsh to the northwestward is not comprehended in the area so designated. Another, made by one Ellis in 1852, marks the high land "Mares Island". All the area to the northwest of the high land, including the land in controversy, is shown as water. A third, made by one Ringgold, a Commander of the Navy in 1850, shows the swamp land to the northwest of what is now the Navy Yard tract but designates only the latter as Mare Island.

Seven United States Coast and Geodetic Survey Charts dated respectively 1851, 1851, 1856, 1859, 1861, 1863, and 1915, designate only the high land by the name of "Mare Island". The United States Geological Survey prepared maps of the Napa quadrangle and the Mare Island quadrangle in 1902 and 1916. In each the high land is marked Mare Island and the land in controversy is marked "Island No. 1". The State Geological Survey of California prepared a map in 1873 which applies the name "Mare Island" to the high land.

San Francisco Savings Union v. *Irwin, supra,* was tried about 1885. The Coast and Geodetic Survey prepared a map for use in

that case which shows only the high land as constituting Mare Island. In the trial of the instant case it was testified that the land in controversy has been for some years known as "Cross Island."

Shortly before the Government purchased Mare Island, and as a basis of the purchase, a Board of Officers known as the Sloat Board reported on the island as a site for a navy yard. This report was made before the confirmation proceedings were concluded. One of the plans attached to the report purports to be a plan of Mare Island showing its topography. The plan covers only the high land. The report states that Mare Island is "bounded on the east by Mare Island Straits which separates it from the City of Vallejo on the west by the bay of San Pablo and on the north by a large tract of tule land extending several miles in the direction of Sonoma." The report speaks of the "north end" of the island as more uniform than the southerly end so that it may easily be reduced to a convenient grade. These remarks cannot well apply to the tule marsh in question. The report states that the island contains "including the tule opposite Vallejo, about 900 acres." There is a further statement that the whole length of the island is about two miles. This describes only the high land as the length would be about ten miles if the tule marsh in controversy were included.

The foregoing facts seem to us to furnish adequate support for a finding that what was granted to Castro was the high land known at the time as Mare Island and not the great extent of tule marsh lying to the northwestward of the former which was apparently not occupied or claimed by Castro or commonly understood to be a part of the land called Mare Island. All that the decree purported to confirm was the title to a "place . . . called . . . Mare Island". Even if the high land was connected by a narrow neck with the tule marsh to the northwestward, that high land might still be called an island either because the narrow neck of low marsh land to its westward was sometimes flooded or because the name "island" was colloquially applied to a piece of land which a geographer would more accurately call a peninsula.[6]

[6] It is common knowledge that lands not in fact surrounded by water are sometimes called islands. See, Century Dictionary; Webster's New International Dictionary; Encyclopedia Brittanica, 14th Ed., Vol. XII, p. 715; Vol. III, p. 381. And compare California State Geological Survey Map of 1873 showing lands called Deer Island, Simms Island, and Green Island.

The Court of Appeals, however, held, and the Government here urges, that the facts recited are immaterial in view of the terms of the decree of confirmation. The undoubted principle that when such a decree defines the boundaries of a tract with precision, the decree cannot be attacked on the ground that the boundaries named were erroneous,[7] is invoked. But the question remains whether the petitioners' contention in this case amounts to such an attack. The description in the decree of confirmation is at best but a vague one. It is of a "place . . . called . . . Mare Island." If there were nothing more it would be competent to show what was in fact the place so known or called. The Government's contention is, however, that, because the Commission added that, being an island it was bounded by the water's edge, this supererogatory statement gives a fixed and definite boundary which overcomes any vagueness inherent in the designation of the place granted. We think no such strict rule has been applied in the interpretation of deeds or, indeed, of decrees of confirmation of Mexican grants in like circumstances. On the contrary, courts have repeatedly resorted to evidence of what was commonly known and called a ranch, or lot, or other place, in order to correct erroneous boundaries stated in a deed description or a decree of confirmation.[8] Thus to explain the meaning and extent of a decree is not to attack it for error but to reconcile all of the descriptive language used to designate the tract title to which is confirmed.

We are of opinion that the evidence in question was of probative value; that its reception and consideration did not run counter to the rule that the decree of confirmation was not open to attack by reason of erroneous description of the land confirmed, and that the proofs furnished a basis for a finding of fact that the land in controversy was not a part of that granted to Castro and confirmed to his vendees. This view renders it unnecessary to discuss the other questions presented by the petitioners. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

So ordered.

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[7] United States v. Halleck, 1 Wall. 439; Higueras v. United States, 5 Wall. 827; United States v. Hancock, 133 U. S. 193.

[8] Parker v. Kane, 22. How. 1; United States v. De Haro, 25 Fed. Cas. 803; Piper v. True, 36 Cal. 606; Haley v. Amestoy, 44 Cal. 132; Wise v. Watts, 239 Fed. 207.